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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

RUSSELL ERICKSON; BETH ERICKSON; KIRK ERICKSON,
vs.
DESERT PALACE, INCORPORATED; CAESARS PALACE,
a Nevada corporation;
CAESARS PALACE CORPORATION,
a Delaware corporation;
DONALD ABRAHAMSON; MARIAN VINCE,
formerly known as Marian Fourno;
STATE OF NEVADA; NEVADA GAMING CONTROL BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Can a state eliminate diversity jurisdiction and the right to a trial by jury in federal court by requiring out-of-state plaintiffs to pursue common law claims solely through a state administrative agency?

II. Can a federal court of appeals give preclusive effects to the findings of a state administrative agency to bar a federal trial without allowing a hearing on the authenticity and content of the state findings?

III. Does a detailed complaint, alleging that a Nevada casino induced a minor to gamble with the intent of not paying him if he won, state a claim for fraud under Federal Rules of Civil Procedure, Rule 9(b), or does a Nevada casino have absolute immunity from suits for fraud, so long as the fraud was committed as part of its licensed gaming?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully request a writ of certiorari to review the Court of Appeals' decision denying petitioners the right to a trial in federal court.

OPINIONS BELOW

The opinion of the court of appeals is reported at 942 F.2d 694) (9th Cir. 1991) (No. 89-16053). (Appendix, pages A1 - A9). The opinions of the district court are not reported (D.C. No. CV-S-88-0660-LDG). (Appendix, pages C1 - C7).

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on August 21, 1991; a petition for rehearing was denied on September 27, 1991. (Appendix, page F1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Sections 1 & 2:

The judicial Power of the United States ... shall extend ... to Controversies ... between Citizens of different States ...

United States Constitution, Article IV, Section 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution, Article VI:

... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment V:

No person ... shall be deprived of life, liberty, or property without due process of law ...

United States Constitution, Amendment VII:

In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1332 [as of 1988]:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —(1) citizens of different States . . .

28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal Rules of Civil Procedure, Rule 9(b):

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

Nevada Revised Statutes §§ 463.361 — 463.368:

"Nevada Gaming Control Act: Recovery of Gaming Debts by Patrons, Recovery of Gaming Debts by Licensees." Included in full in Appendix, pages G1 - G13.

STATEMENT OF THE CASE

On August 5, 1987, Kirk Erickson, a tourist from Arkansas, played the slot machines at Caesars Palace in Las Vegas, Nevada. Caesars Palace sold him tokens good only for play in its slot machines. It took Kirk's money when he gambled and lost and paid him small amounts when he gambled and won. Kirk then inserted three one-dollar tokens into a slot machine, pulled the handle and lined up certain winning symbols. Caesars Palace had told Kirk that if he lined up these symbols he would win exactly $1,061,812.00.

Caesars Palace refused to pay Kirk, because he was 19 years old.

This suit arises out of Kirk's claim for fraud. Kirk has alleged in paragraph 24 of his complaint that Caesars Palace did not intend to pay Kirk a jackpot.

Kirk first filed his claim for recovery of unpaid gambling winnings with the State Gaming Control Board, as he was required to do. Through depositions, Kirk's attorney discovered that the Board had an unwritten policy: the Board allowed a casino the right to decide for itself

whether it would or would not pay a minor who won. The Board had told Caesars Palace about this unwritten policy, but had not informed Kirk or any other player.

Kirk's attorney also believed, from his discussions with the hearing examiner of the State Gaming Control Board, that the Board would not allow him to present all of the witnesses he wished. Specifically, Kirk's attorney felt he could not put on witnesses to prove that Caesars Palace had a pattern and practice of allowing minors to gamble, with the intent of defrauding children out of their money. Kirk's attorney was told by the Board hearing examiner that fraud was not relevant to the issue of the collectability of the jackpot winnings.

On August 11, 1988, while the dispute was pending before the State Gaming Control Board, plaintiffs filed this suit in federal district court in Nevada.

Original jurisdiction was based on diversity, 28 U.S.C. § 1332(a)(1). Plaintiffs were Kirk, his father, Russell, and his mother, Beth, who were playing the Caesars Palace slot machines together. Plaintiffs are all citizens of Arkansas. Named as defendants were the corporate entities that constitute Caesars Palace, Nevada and Delaware corporations, and the Nevada state regulators directly involved in the dispute, specifically including the State Gaming Control Board itself.

The complaint contained five claims for relief, including a separate claim against Caesars Palace based on "Fraud and Cheating." This claim incorporated by reference the prior two claims and consisted of 26 numbered paragraphs. The complaint named the State Gaming Control Board in two separate claims for relief and included allegations that the Board's hearing procedures were

unconstitutional and that the Board had acted collusively with Caesars Palace.

Kirk requested the Gaming Control Board hearing examiner to vacate the hearing, in light of the suit pending in federal court. The hearing examiner denied the request and conducted the hearing on behalf of the Board on Kirk's claim for unpaid gaming winnings on August 23 and 24, 1988, less than two weeks after the Board had been named as a defendant by Kirk in this federal court lawsuit. The entire hearing took less than two days.

The Board rendered its decision on November 9, 1988, ruling that Caesars Palace was not obligated to pay the slot machine jackpot based on findings that a state statute, NRS § 463.350 (since amended to eliminate the ambiguity), did not allow a minor to collect, and further, that Caesars Palace had not committed fraud.

On March 9, 1989, the federal district court dismissed the complaint. The dismissal was based on two grounds: lack of subject matter jurisdiction due to failure to exhaust administrative remedies and failure to state a claim.

The district court of Clark County affirmed the Board's decision without comment on July 3, 1989. The Board's decision was upheld by the Nevada Supreme Court on May 21, 1990. The Nevada Supreme Court decision is limited to Kirk's claim for slot machine winnings, not for a cause of action of fraud, and was decided on narrow grounds of interpretation of the Nevada gaming statute involved, NRS § 463.350.

Although the state decisions were never made part of the record in federal court, for the convenience of this Court copies of the decisions from the state proceedings

are attached in the Appendix. (Gaming Control Board Decision, pages B1 - B16; Clark County District Court Order, pages D1 - D2; Nevada Supreme Court Order, pages E1 - E3).

Kirk appealed the federal court's dismissal. Kirk limited his federal appeal to only the third cause of action alleging fraud and cheating, and only against Caesars Palace.

The federal court of appeals opinion was filed on August 21, 1991. The court of appeals recognized the intervening state court decisions: "Because the Nevada Supreme Court has issued its decision, the Ericksons now have exhausted their administrative remedies." Appendix, page A6. There is thus now no dispute that the federal courts have subject matter jurisdiction to hear this case.

Caesars Palace raised only two arguments on appeal in federal court. For the first time Caesars raised the doctrines of collateral estoppel or res judicata (although, it is unclear which); arguing, that the findings of the State Gaming Control Board can be used to prevent Kirk from having a trial to prove fraud. Caesars Palace's attorney based his written brief's argument on the federal full faith and credit clause, 28 U.S.C. § 1738, but failed to comply with any of the provisions of that statute.

Caesars Palace's second argument was that a Nevada casino has absolute immunity from suits for fraud, so long as the fraud is committed as part of its licensed gaming.

The federal court of appeals apparently adopted Caesars Palace's argument, at least as it dealt with preclusion. The court refused to reverse the dismissal, characterizing Kirk's claim as a "gambling debt." It based its decision on findings from the State Gaming Control Board and the state Supreme Court. No request

for judicial notice was ever made, nor was one given by either federal court. It is unclear which state proceedings were used by the federal court since none of the state decisions have ever been authenticated, or even formally submitted to either federal court.

Kirk Erickson has never had a jury trial.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Opinion Undercuts the Independence of the Federal Judicial System.

Ever since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), some commentators have argued that a federal court sitting in diversity should be treated as merely another state court. This case raises the important question whether Article III, the Supremacy Clause and the Seventh Amendment put constitutional limits on that view of the *Erie* doctrine.

The rise of state administrative agencies and the expansion of the use of issue and claim preclusion in federal courts now force the issue. Can a state require all common law causes of action be heard by an administrative agency, whose findings will then bind the federal courts?

Erie did mark a radical change in the thinking of federal courts. No longer were the federal courts free to decide "the law" from their own abstract logic. In a diversity case, federal courts now have to look to state court decisions and legislative enactments for substantive law.

However, federal courts have never had to follow all state procedures. More importantly, *Erie* has never been understood to mean that a state can change its proce-

dures in such a way as to completely eliminate diversity jurisdiction and the right to a jury trial in federal court.

This case is a model of why diversity jurisdiction was created in the United States Constitution. The plaintiff, Kirk Erickson, is an out-of-state tourist, a 19 year old from Hot Springs, Arkansas. Kirk claims he was defrauded by Caesars Palace of Las Vegas, Nevada, a multi-billion dollar licensed casino and one of the forum state's largest taxpayers. As is well known, Nevada's economy is heavily dependent upon its licensed casinos. An out-of-state resident might very well feel safer in federal court; in this very controversy one of the justices of the Nevada Supreme Court recused himself, because he had part-ownership of a casino.

The federal district court in this case dismissed plaintiff's claim for failure to exhaust administrative remedies, even though the state agency, the State Gaming Control Board, had already rendered its decision. Kirk was thus forced to pursue a review of the state agency's decision through the state court system and could not proceed with his claim through trial in federal court. Appeal through the state system was extremely restricted: the state courts were explicitly told by statute not to conduct a trial de novo, and they could only overturn the state agency's decision on the most limited grounds, such as finding the decision was unsupported by any evidence. NRS § 463.3666.

After appeal of the state agency's decision was taken all the way through the state supreme court, the federal court of appeals held that administrative remedies had been exhausted. However, rather than reinstating the federal suit, the court held, in effect, that it was now bound by the decisions of the state agency and state

courts. Plaintiff was thus deprived of all right to a jury trial in federal court despite having complete diversity.

It is probably too late in the evolution of American jurisprudence to question whether the very existence of administrative agencies acting as courts of law deprive parties of their right to trial by jury. In most cases, the administrative agency is reviewing a new right created by statute, such as rate-making or licensing, not a cause of action long established under the common law; the agency has set procedures that comply with constitutional requirements of due process; and, the agency's decision can be reviewed by a true court, often with a trial de novo.

It is also clear that there exists a need to heavily regulate legal casino gambling in Nevada, a morally suspect industry with a history of corruption, infiltration by organized crime and exploitation of compulsive gamblers. Cf., Ed Reid & Ovid Demaris, *The Green Felt Jungle* (1964). A licensee, like Caesars Palace, submits itself knowingly and willingly to the jurisdiction of the state administrative system when it applies for a state license.

But to hold that an innocent out-of-state victim, who alleges that he has been intentionally defrauded by a state licensee, has lost not only his right to a jury trial, but also the right to bring his common law cause of action for fraud in federal court, violates the fundamental existence of a separate federal judiciary.

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), this Court held that a diversity plaintiff had the right to a trial by jury in federal court on certain factual questions, despite express holdings of the South Carolina Supreme Court that the issue would be decided by a judge and not a jury if the case had been heard in state court. In the case of Kirk Erickson, this

diversity plaintiff was denied his right to a jury trial on every issue, because the state legislature has decided all of his common law actions had to be brought before a state administrative agency. It would be more than a little incongruous to hold that federal courts are free to ignore state laws on issues like written jury instructions, *Lincoln v. Power,* 151 U.S. 436, 442 (1894), see, *Diederich v. American News Co.,* 128 F.2d 144 (10th Cir. 1942), but are bound to follow state laws that have the effect of eliminating the jury completely.

As Chief Justice Rehnquist warned in his dissent in *Parklane Hosiery Company, Inc. v. Shore,* 439 U.S. 322, 339 (1979), the right to a jury trial is always subject to attack in the name of "procedural reform." The Seventh Amendment's right to a jury trial according to common law procedures may be burdensome, but it is a right historical and constitutional. *Id.* at 344; U.S. Const. amend. VII.

Equally as important as a plaintiff's right to a jury trial is the right to be heard in federal court when there is complete diversity. U.S. Const. Art. III §§ 1 and 2; 28 U.S.C. § 1332(a)(1). Diversity jurisdiction is not merely another federal procedure, it is subject matter jurisdiction and thus goes to the heart of the sovereignty of the federal judiciary. The power of a court to hear cases is the right of that court to exist.

After considerable debate over whether there should even be a separate court system, drafters of the Constitution left to Congress which inferior federal courts would be created. But there is no doubt that Article III established a separate national court system, specifically designed to hear diversity cases. The first Congress agreed, passing legislation to ensure that controversies between citizens of the no-longer independent states could be

heard in a non-biased court. Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction,* 46 A.B.A.J. 959 (1960).

Even if diversity jurisdiction were "merely" procedural, federal courts have never allowed a state statutory scheme to completely divest out-of-state plaintiffs of their right to be heard in diversity. See, e.g., *Szantay v. Beech Aircraft Corp.,* 349 F.2d 60 (4th Cir. 1965).

Whether substantive or procedural, diversity jurisdiction is constitutionally mandated for federal courts. The Supremacy Clause, U.S. Const. Art. VI, prohibits a state from interfering with a federal court's power to hear a case in diversity, regardless of the state's motives.

II. The Court of Appeals' Opinion Undercuts the Procedural Due Process of the Federal Judicial System.

Even if a state can require that common law claims must be submitted to an administrative hearing, whose decisions will be binding on later federal courts, it is clear that those administrative proceedings must comply with federal standards of due process. U.S. Const. amend. V, XIV. Petitioners believe that it is important for this Honorable Court to require the lower federal courts to conduct a hearing to establish the authenticity and content of state proceedings, before those state proceedings can be used as a complete bar to a plaintiff's federal lawsuit.

Can the findings of a state agency be used by a federal court of appeals for res judicata or collateral estoppel when the question was not raised in the federal district court, the findings were never authenticated, the state administrative decision had been modified on appeal by the state supreme court, and the administrative agency was itself a named defendant in the same federal suit? In

this case, the court of appeals used the findings of the State Gaming Control Board for issue or claim preclusion to bar a federal trial, without any of the state proceedings having been proved or even admitted, as required by the federal full faith and credit statute, 28 U.S.C. § 1738, nor by common law developed around the full faith and credit section of the constitution, U.S. Const. Art. IV, § 1.

The federal court of appeals also failed to consider Nevada state law in determining the preclusive effect of the state decisions, as required by both the federal common law of preclusion and by statute, 28 U.S.C. § 1738. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-385 (1985); *Migra v. Warren City School District Bd. of Education*, 465 U.S. 75 (1984). The Nevada Supreme Court's review of the Gaming Control Board's decision was limited to statutory interpretation; that Court explicitly stated, "Our resolution of this issue makes it unnecessary to address appellants' *in pari delicto* argument." Appendix at p. E1. There is nothing in the record to demonstrate that a Nevada court would give preclusive effects to an administrative agency's determinations, when those determinations were specifically *not* addressed by the state supreme court.

If plaintiff had had the opportunity to challenge the state proceedings in federal court, he would have disputed those findings for both substance and procedure.

It is plaintiff's position that the jurisdiction of the State Gaming Control Board is limited by statute to claims of unpaid gambling winnings. NRS §§ 463.361-.3668. The Board simply does not have the power to hear claims for fraud; it certainly cannot award punitive damages. The Board has no special expertise to evaluate claims of fraud.

Further, even if the Board could bind the parties on the question of fraud, Kirk asserts that he was denied due process by the Board's procedure. The Nevada Supreme Court has expressly ruled that the State Gaming Control Board's decisions need not meet Fifth Amendment standards of due process, because the Nevada court felt there was "no room for federally protected constitutional rights." *State v. Rosenthal,* 93 Nev. 36, 559 P.2d 830 (1977), appeal dismissed, *Rosenthal v. Nevada,* 434 U.S. 803 (1977).

The State Gaming Control Board was given unconstitutional power by the Nevada state legislature: to act as police officer, investigator, prosecutor, judge, jury and executioner, all within the same proceeding. The Board conducts much of its business through investigative hearings, conducted by a hearing examiner. Hearing examiners may be appointed by the Board without notice, and may conduct their investigative hearings "in private at the discretion of the Board or hearing examiner." NRS § 463.110. The Board is "entirely exempt" from the state Administrative Procedures Act. NRS § 233B.039(1)e.

The state legislature further has given the Board sole authority to resolve players' claims of unpaid winnings. The Nevada legislature and Board originally created a system that required both players and casinos to go before the Board to resolve any dispute over claims of unpaid winnings; players, however, were not allowed to appeal adverse decisions, while casinos could appeal adverse decisions to another agency, the Nevada Gaming Commission, and then to the state courts. The Nevada Supreme Court upheld this unequal right to judicial review. *State Gaming Control Board v. Breen,* 99 Nev. 320, 661 P.2d 1309 (1983).

In 1983 casinos were given the right to sue, in court, players who borrowed money for gambling. NRS §§ 463.367-.368. Players still can not sue casinos when the casino refuses to pay.

Finally, in 1987, players were given the right to go to court against casinos to collect gambling debts, but only to review decisions of the State Gaming Control Board. Judicial review is specifically prohibited from being a trial de novo. The court, confined to the record on review, can remand or reverse the Board only if it finds

> the substantial rights of the petitioner have been prejudiced because the [Board's] decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the board;
>
> (c) Made upon unlawful procedure;
>
> (d) Unsupported by any evidence; or
>
> (e) Arbitrary or capricious or otherwise not in accordance with law.

NRS 463.3666.

Since no evidentiary hearing was ever held in federal court, Kirk's attorney was unable to show that the Board's procedure did not conform to the requirements of due process. As one example, Kirk's attorney was told by the Board's hearing examiner that he could not put on witnesses to prove that Caesars Palace had a pattern and practice of allowing minors to gamble, to show Caesars Palace intended to defraud minors out of their money, because fraud was not relevant to the issue of the collectability of the jackpot winnings. Now, Kirk is told that

the decision by the hearing examiner that Caesars Palace did not commit fraud is binding on him in federal court.

The self-interest of the Board is beyond question. The State Gaming Control Board was a named defendant in the federal lawsuit. The federal complaint specifically alleged that the Board acted "tortiously and collusively" with Caesars Palace to deprive Kirk of his winnings. The Board held a short hearing, over Kirk's protest, and issued a decision. The federal court of appeals has given the Board's own decision the effect of establishing that the Board did not act tortiously and collusively with Caesars Palace.

The State Gaming Control Board is a captive regulator of the Nevada casino industry. In what is basically a one-industry state, it is not surprising that when Board officials leave state government, they often end up working for casinos or firms that represent casinos. It is more surprising how blatant the connection has become.

In the 60 years that casino gambling has been legal in the state of Nevada, no casino has been fined a penny for allowing minors to gambling. We do not know if the Board has *ever* decided a case in favor of a player over a casino.

In this case, Caesars Palace turned over what it said were its citations for a two-year period, convincing the Board that the casino actively prevents minors from gambling. Excluding the scores of citations for prostitution and drunkenness by minors, the citations do show Caesars Palace removed about a dozen minors for gambling over a period of 24 months. In New Jersey, by contrast, where the law against minors gambling is vigorously enforced, during just one year (1987) of that same two-year period, Atlantic City's 12 casinos reported ex-

cluding 200,000 minors at the door and removing another 35,000 from the casino floor. Yoshihashi, *Casinos, Regulators Grapple With Rise in Teen Gamblers,* Wall Street J., Feb. 27, 1989, at B1, col. 4.

Faced with a dispute over whether this minor could be paid a slot machine jackpot, the State Gaming Control Board did not send out letters to its regulated casinos telling them to put up adequate warning signs; it did not ask the Nevada Gaming Commission for a regulation requiring warning signs on every slot machine, or, at least, at the entrance to the casino gaming area; it did not request legislation requiring that any jackpot won by a minor be turned over to the state rather than be kept by the very casino which violated the law. What it did was exactly what Caesars Palace asked it to do: nothing, except for proposing legislation that now makes it easier in the future for a casino to keep all of a minor's money. NRS § 463.350(1)(a), amended 1991, ch. 266, § 1, p. 652, at request of the State Gaming Control Board. Again, by contrast, New Jersey regulators have promulgated stiff regulations and imposed large fines to prevent casinos, including Caesars Palace, from exploiting minors. *State, Dept. of Law and Public Safety, Div. of Gaming Enforcement v. Boardwalk Regency Corp.,* 227 N.J.Super. 549, 548 A.2d 206 (1988) (upheld New Jersey Casino Control Commission fine based on a theory of strict liability against Caesars Palace's Atlantic City casino for allowing two minors in gambling area); New York Times, Feb. 12, 1988, at Y15, col. 6 (Caesars Palace's Atlantic City casino faces $700,000 in fines for encouraging a minor to gamble and serving the minor alcoholic drinks).

The State Gaming Control Board's hearing examiner made it very clear that he would not allow plaintiff to put on many witnesses. He initially indicated that Kirk's

attorney could not even call a former security guard, who would testify that Caesars Palace took no action to remove minors from the gaming floor, because the hearing examiner called the testimony irrelevant. The Board's hearing examiner only allowed in that testimony after Kirk filed this lawsuit against the Board in federal court.

Due process places many requirements on a federal court before it can make preclusive use of state proceedings. If the court of appeals held that the *issue* of Caesars Palace's fraud had been decided for all time by the Board, it had to first show that the issue had been actually litigated and determined, was part of a valid and final judgment, and that the determination that Caesars Palace had not committed fraud was essential to the final judgment that Kirk could not collect on his unpaid winnings. Restatement of Judgments 2d § 27; *City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 15 Fed.R.Evid.Serv. 1386 (6th Cir. 1984).

If the court of appeals held that Kirk Erickson's *claim* against Caesars Palace for fraud had been decided for all time by the Board, it had to first show that there was a valid and final judgment and that the claim of fraud was part of the transaction out of which the action for unpaid winnings arose. Restatement of Judgments 2d § 24. Even then, the fraud claim would not be extinguished if "The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the" Board. *Id.*, §§ 26(1)(c) and 83; *United States v. Radio Corp. of America*, 358 U.S. 334 (1959). The Restatement uses as an example a workers' compensation commission that lacks authority to consider claims for punitive damages. Restatement of Judgments 2d § 83, Comment g; *Texas Employers' Ins. Ass'n. v. Jackson*, 862

F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989). The Gaming Control Board cannot consider claims for punitive damages, and the state courts were equally barred in their review of the Board's decision.

The federal court of appeals should have remanded the case for a hearing on whether the state proceedings could be used for issue or claim preclusion.

III. The Federal Courts Misapplied the Federal Rules of Civil Procedure.

Plaintiff's complaint for fraud in this case was dismissed for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6). Therefore, there is only one document in this record on appeal: the complaint itself.

Although the federal court of appeals discussed in general the standard for review of a dismissal under Rule 12(b)(6), it failed to recognize that the standard to be applied in this particular case is whether the complaint gives adequate notice of a claim of fraud. The court of appeals made no mention of Federal Rules of Civil Procedure, Rules 9(b) nor 8. By characterizing a detailed complaint for fraud as a claim for recovery of a gambling debt, the court of appeals undermined the purpose of notice pleading in the Federal Rules.

"[A] pleading is sufficient under Rule 9(b) if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' " *Semegen v. Weidner*, 780 F.2d 727, 735 (9th Cir. 1985).

The standard to be applied in an appeal of a 12(b)(6) dismissal is heavily against dismissal and in favor of liberal construction of complaints. This is true for a complaint for fraud: "In reviewing the motions to dismiss,

'[a]ll the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.' " *Wool v. Tandem Computer Inc.*, 818 F.2d 1433, 1439, 8 Fed.R.Serv.3d 91 (9th Cir. 1987).

The Federal Rules of Civil Procedure were designed to replace the old code pleading requirements, eliminating the formalities surrounding statements of a cause of action. The court should not have granted the motion to dismiss unless it appeared that Kirk could prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Caesars' failure to pay Kirk his winnings was merely a breach of a non-enforceable contract. But the allegation that Caesars "did not *intend* to pay a jackpot," (Complaint paragraph 24), states a cause of action for fraud.

> The fraud was entering into the . . . agreement with only a limited intention of performing. This is a sufficient averment.
>
> . . . .
>
> "It has been the law under the mail fraud statute ever since a Supreme Court decision in 1896 (*Durland v. United States,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709) that 'to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold, is a fraud.' " 3 L. Loss, Securities Regulation 1436-47 (1st ed. 1961); accord, *Keers and Co. v. American Steel and Pump Corp.*, 234 F.Supp. 201, 203 (S.D.N.Y. 1964).

Walling v. Beverly Enterprises, 476 F.2d 393, 397 and at fn.6 (9th Cir. 1973).

This is the substantive common law of Nevada and binding on the federal courts under *Erie Railroad v.*

Tompkins, 304 U.S. 64 (1938). "The fact that the tort alleged incidentally involves a breach of contract does not preclude the recovery of punitive damages." *Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.*, 596 F.Supp. 344, 346 (D.Nev. 1984).

The allegations in the complaint put this case on all fours with federal cases which held Nevada casinos can be sued for fraud: *Berman v. Riverside Casino Corp.*, 323 F.2d 977 (9th Cir. 1963), and *Zaika v. Del E. Webb Corp.*, 508 F.Supp. 1005 (D.Nev. 1981). It must be remembered that Caesars Palace took *all* of Kirk's money, including his losses, just like in the other crooked casino cases. Instead of using loaded dice, Caesars Palace used a rigged slot machine game that the minor could never win. Caesars Palace even kept the last three dollars the minor put in that won the jackpot.

Although Kirk has asked the trial court to measure damages for this fraudulent scheme by the amount of the bargain lost, that requested remedy does not change the suit into one for a gambling debt. Kirk's complaint also asked for $20,000,000 in punitive damages, a remedy inconsistent, under Nevada law, with a claim for breach of contract. *Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.*, 596 F.Supp. 344 (D.Nev. 1984). A claim for relief is not changed from a tort into a breach of contract simply because the prayer asks for a specific amount by an accepted measure of remedy, rather than "damages to be proved at trial." Cf., W. Prosser & R. Keeton on Torts, Fifth Edition, p.768; *Randono v. Turk*, 86 Nev. 123, 130, 466 P.2d 218, 222-3 (1970); *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819, 822 (1987).

The federal court of appeals correctly ruled that a player attempting to collect winnings from a casino is limited to an administrative hearing before the State

Gaming Control Board. Collection of a gambling debt is a statutory cause of action, in derogation of the established common law of contracts. I. Nelson Rose, *Gambling and the Law* ch. 11 (1986). The court was equally correct in stating that the refusal of a casino to pay winnings, by itself, gives rise only to a claim to a gambling debt and does not amount to a claim of fraud. It would indeed undercut the Nevada system if a party could "avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings." Opinion at Appendix p.A9.

However, Kirk's claim for fraud is not based solely on the mere refusal of the casino to pay the slot machine jackpot.

Kirk's claim is that Caesars Palace contrived a comprehensive scheme to intentionally defraud this particular minor out of his money.

The elements of the fraud were as follows:

- Caesars Palace had actual knowledge that Kirk was over 18 but under 21, Nevada's legal gambling age, when it let him gamble;

- Caesars Palace knew that in virtually every other state the legal gambling age is 18, not 21;

- Caesars Palace knew that Kirk had never before set foot in a casino and did not know how to gamble in a casino;

- Caesars Palace taught Kirk how to gamble in its casino by, among other things, showing him an instructional video tape and a how-to-gamble guide book;

• Caesars Palace left out of its instructional video tape and how-to-gamble guide book any mention of Nevada's unusual legal gambling age;

• Caesars Palace left out of its tape and guide book any warning that minors might not be paid if they won;

• Caesars Palace intentionally posted signs that were inadequate in number, placement and construction, stating the legal gambling age was 21. These few signs, some with vast amounts of tiny print far from the casino floor, were purposely designed to be ignored by players among the flashing lights and enticements of Caesars Palace's casino, while enabling Caesars to assert it had posted warnings;

• Caesars Palace enticed Kirk to gamble;

• Caesars Palace sent casino personnel to ask Kirk to gamble. Caesars Palace's casino personnel sold Kirk keno tickets, good only at this casino;

• Caesars Palace offered Kirk alcoholic beverages, even though he was underage;

• Caesars Palace had other casino personnel sell Kirk gaming tokens, instantly redeemable for cash, that stated on the tokens themselves, "One dollar gaming token, for use by player only" and "One dollar gaming token, acceptable only at Caesars Palace Las Vegas." These tokens were good only for playing Caesars Palace's slot machines;

• Caesars Palace told Kirk, through its signs, that if he played the slot machine and lined up certain symbols he would lose;

• Caesars Palace took Kirk's tokens when the losing symbols appeared;

• Caesars Palace told Kirk that if he played the slot machine and lined up certain winning symbols he would win small amounts;

• Caesars Palace paid Kirk the proper small amounts when the winning symbols appeared;

• Caesars Palace enticed Kirk to continue gambling;

• Caesars Palace's casino employees sold Kirk more slot machine tokens;

• Caesars Palace told Kirk that if he played the slot machine and lined up other winning symbols he would win large amounts;

• Caesars Palace checked the identification of players who won large amounts;

• Caesars Palace did not check the identification of minors who were losing or had already lost;

• Caesars Palace intended to check Kirk's identification only if he won a large amount, using the federal tax laws as an excuse;

• Caesars Palace knew of an unwritten policy of the State Gaming Control Board which let the casino decide whether it would pay off minors who won;

• Caesars Palace knew that Kirk had no way of finding out about the Board's secret policy;

• Caesars Palace had no signs anywhere nor notices in any of the massive amount of material it distributed to customers warning that the casino had the power to decide which winning minors it would pay and which it would "stiff;"

• Caesars Palace did not warn Kirk while it was gambling with him that minors might not be paid;

• Caesars Palace knew that Kirk would rely upon the casino's false and misleading statements and its active misrepresentations and failures to disclose;

• Kirk did rely to his detriment on Caesars Palace's false and misleading statements and its active misrepresentations and failures to disclose;

• Caesars Palace has, over the years, victimized others with the same fraudulent scheme: it repeatedly has taken money from minors who have lost, paid out small amounts to minors who have won, enticing them to continue gambling, and kept the money of minors who have won large jackpots. Caesars Palace had done this a large number of times prior to its initiating the scheme to defraud Kirk. On information and belief, plaintiffs assert that Caesars Palace is still, to this day, conducting this scheme to exploit children;

• Caesars Palace knew that in the almost 60 years that casino gambling has been legal in Nevada, no casino has ever been fined or had its license revoked or suspended for allowing minors to gamble. Caesars Palace thus knew that there was no risk in instituting its plan to defraud minors: if the minor lost Caesars Palace kept the money, if the minor won big Caesars Palace checked his identification and Caesars Palace kept the money, and if caught gambling with minors, Caesars Palace would face no risk of economic sanctions;

• Caesars Palace did an inadequate job of excluding minors from its casino. In Atlantic City, where Caesars Palace has paid stiff fines for allowing mi-

nors to gamble, each casino reported excluding and ejecting tens of thousands of minors each year. For the year in question, Caesars Palace in Las Vegas reported excluding or ejecting less than 20 minors for gambling;

- Caesars Palace intended to take Kirk's money whether Kirk lost or won;

- Caesars Palace, in fact, did take Kirk's money both when Kirk lost and when he won a million dollar jackpot.

The elements of Caesars Palace's scheme are spelled out here in detail to show that Kirk's claim of fraud is not limited to Caesars Palace's refusal to pay a jackpot. It would have been improper to have put in such evidentiary matter in the complaint, even for a claim of fraud. *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973).

Caesars Palace's alternative grounds for upholding dismissal of this federal lawsuit would normally not be worthy of consideration by this Court, since it revolves solely around an issue of state law. However, the federal court of appeals' opinion could be read as adopting Caesars Palace's assertion that a licensed Nevada casino is completely immune from suits for fraud, so long as the fraud is committed against a player who is gambling. To protect the general public, the decision should not be allowed to stand.

Caesars Palace asserted in the court below that the Nevada legislature must have meant to overturn the federal decisions holding that a casino can be sued for fraud, *Berman v. Riverside Casino Corp.*, 323 F.2d 977 (9th Cir. 1963), and *Zaika v. Del E. Webb Corp.*, 508 F.Supp. 1005 (D.Nev. 1981), as well as hundreds of years of common law, when it amended the Gaming Control Act

by adding NRS §§ 463.361-.366. Even a cursory reading of those sections and the companion sections enacted at the same time, NRS §§ 463.367-.368, shows the law was amended to deal only with gambling debts, not fraud. The intent of the legislature was to eliminate the incongruous situation where legal casino gambling had become the state's principal industry and yet neither casinos nor players had any remedy if the loser refused to pay the winner. The legislature created an administrative remedy, through the State Gaming Control Board, when a casino refused to pay, and a judicial remedy for the casino when the player refused to pay.

There is literally nothing to indicate these new sections were intended to require players to take their fraud claims to an administrative agency. If Caesars Palace's position is correct, this statute violates the constitutional requirements of equal protection, U.S. Const. amend. XIV, since some remedies, such as punitive damages and jury trials, are allowed only to one special class, casinos, but not to players.

Caesars Palace's position is that these new sections completely preempt the field, that there is no longer a common law cause of action for fraud remaining when a player is cheated by a casino. If the legislature were going to so completely strip players of all their rights to sue for fraud; to create a single class of privileged citizens, licensed casinos, who could now commit fraud and never face punitive damages; to overturn a body of law that has developed over the centuries and been accepted by virtually all of the English speaking world, it might have taken the time to say so in either the statute or the legislative history.

Legal gambling is one of the fastest growing industries in the country. With state lotteries and casinos spreading

to every state, the dangers to the general public, especially to minors, cannot be ignored. The laws against minors gambling were designed to protect the minors, not to allow a casino to take their money. The Supreme Court should not allow a decision to stand that says a licensed casino cannot be sued for defrauding a child.

CONCLUSION

Petitioner asks this Court to remand the case for trial on the single issue of fraud. If this Court should decide that there is a question of possible claim or issue preclusion from the state proceedings, Petitioner asks the Court to remand for a full evidentiary hearing on those issues.

Respectfully submitted

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ERICKSON; BETH ERICKSON;
KIRK ERICKSON,
Plaintiffs-Appellants,

v.

DESERT PALACE, INCORPORATED; CAESARS PALACE,
a Nevada corporation;
CAESARS PALACE CORPORATION,
a Delaware corporation;
DONALD ABRAHAMSON; MARIAN VINCE,
formerly known as Marian Fourno;
STATE OF NEVADA; NEVADA GAMING CONTROL BOARD,
Defendant-Appellees.

No. 89-16053
D.C. No. CV-S-88-0660-LDG

OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
November 8, 1990 — San Francisco, California

Filed August 21, 1991

Before: Ruggero J. Aldisert*, Arthur L. Alarcon and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

*Honorable Ruggero J. Aldisert, United States Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Courts and Procedure

Affirming a district court judgment dismissing an action for lack of subject matter jurisdiction, the court of appeals held that a Nevada statute confined appellants to the state administrative process, followed by state judicial review, in their attempt to force a casino to turn over alleged winnings.

Appellant Russell Erickson filed a formal complaint with the Nevada State Gaming Control Board in an attempt to recover a jackpot won by Kirk Erickson, who was under 21, the legal gambling age in Nevada. The casino involved had refused to pay Erickson the jackpot. The Board found that NRS 463.350 prohibited Kirk Erickson from collecting the slot machine jackpot. A state court affirmed the Board's denial, and the Nevada Supreme Court upheld the Board's decision that NRS 463.350 prohibited Erickson from collecting the jackpot, and that there was no evidence the casino knowingly allowed him to gamble while underage, which might support a claim of fraud. An action by Erickson in federal district court was dismissed for lack of subject matter jurisdiction. The district court held that Erickson could not maintain a civil action to recover a jackpot, but instead was limited to an administrative proceeding followed by judicial review.

[1] The court agreed with the district court that Nevada characteristically categorizes suits to collect unpaid gambling winning as gaming debts. The district court had correctly held that NRS 463.361 to 463.3688 limits a plaintiff's recovery of a gaming debt to the exclusive administrative/judicial review procedure contained there. [2] The court rejected Erickson's argument that the

limitation imposed by NRS 463.361 did not apply in this case because the casino's refusal to pay the slot machine jackpot amounted to fraud. [3] Erickson did not sue to recover losses sustained as the result of a crooked gambling game. Rather, Erickson sought damages for fraud in the amount they would have won had Kirk been a legal gambler. Whether or not the casino's refusal to turn over the casino jackpot amounted to fraud, the remedy sought here was recovery of an alleged gaming debt. Since the passage of NRS 463.361, any action to recover such a debt is confined to the administrative process followed by state judicial review. [4] The court did not believe the Nevada legislature intended to allow parties to avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings. Therefore, Erickson failed to state a claim upon which relief could be granted.

COUNSEL

I. Nelson Rose, Los Angeles, California, and James P. Sitter, Las Vegas, Nevada, for the plaintiffs-appellants.

Marc H. Rubinstein, Lionel Sawyer & Collins, Las Vegas, Nevada, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Appellants Russell, Beth, and Kirk Erickson appeal the district court's order dismissing their complaint for lack of subject matter jurisdiction and for failure to state a claim. The Ericksons brought this action against corporate defendants operating Caesar's Palace Casino in Las Vegas, Nevada, seeking to recover a $1,061,812.00 slot machine jackpot won by Kirk, a minor. The Erickson's

alleged breach of contract, quasi-contract, fraud and cheating, and interference with contract, and sought declaratory judgment regarding the unconstitutional implementation and enforcement of a Nevada statute. The Ericksons appeal only the dismissal of their third cause of action alleging fraud and cheating. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

We review de novo the dismissal of a complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989) *cert. denied*, 58 USLW 3801 (1990). Dismissal is proper when it appears the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

The Ericksons assert diversity jurisdiction. Therefore state law applies to this action and we are bound by Nevada's Supreme Court case law. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *Olympic Sports Prod., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 912-913 (9th Cir. 1985), *cert. denied sub nom Whitaker Corp. v. Olympic Sports Prod., Inc.*, 474 U.S. 1060 (1986).

I.

On August 5, 1987, the Ericksons visited Caesar's Palace Casino in Las Vegas, Nevada. Kirk, then 19, purchased tokens and won a jackpot of $1,061,812.00. Because Kirk was under 21, the legal gambling age in Nevada, the casino refused to pay him the jackpot. *See* NRS 463.350.

Under Nevada law, an unpaid slot machine jackpot is a gaming debt not evidenced by a credit instrument. *Har-*

rah's Club v. State Gaming Control Bd., 104 Nev. Adv. Op. 129, 766 F.2d 900 (1988) (casino patron's claim to an unpaid slot machine jackpot considered "disputed gaming debt"); *State Gaming Control Bd. v. Breen*, 99 Nev. 320, 323, 661 P.2d 1309, 1311 (1983) (patron seeking recovery of unpaid keno winnings found to have "no claim other than a gambling debt").

NRS 463.361, enacted in 1983, states: "Except as provided in NRS 463.361 to 463.366, inclusive, gaming debts not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action." NRS 463.362 to 463.366 provide for review of a casino's refusal to pay alleged winnings to a patron by the State Gaming Control Board (the "Board"). NRS 463.3662 to 463.3668 provide for review of the Board's decision by a Nevada District Court and by the State Supreme Court. NRS 463.3668(2) provides that judicial review by the state courts is the exclusive method for review of the Board's actions.

The Ericksons filed a formal complaint under NRS 463.363 with the Board on August 7, 1987. When the Board's Enforcement Division denied the Erickson's claims on November 9, 1988, they filed a petition seeking reconsideration which was also denied. Specifically, the Board found that NRS 463.350 prohibited Kirk Erickson from collecting the slot machine jackpot and that any contract that may have existed between the defendant casino and Erickson was inoperative because it violated NRS 463.350. The Board also held that Erickson had not properly stated a claim for restitution, quasi contract or unjust enrichment, because he sought payment of the jackpot rather than return of the three $1 tokens he had used, and those theories permit only damages to the extent of the benefit to the defendant. Finally, the Board

held because the Casino had properly warned Erickson that the legal gambling age is twenty-one and had made no misrepresentations of gambling rules, defendant was not guilty of fraud.

Pursuant to NRS 463.3662, the Ericksons petitioned the Eighth Judicial District Court of Nevada for Clark County to review the Board's ruling. The district court affirmed the denial of the claim, whereupon the Ericksons petitioned the Nevada Supreme Court for judicial review. The Nevada Supreme Court dismissed the appeal on May 21, 1990. The Court agreed with the Board that NRS 463.350 prohibited Erickson from collecting the jackpot, and that there was no evidence the casino "knowingly allowed Erickson to gamble while underage," which might support a claim of fraud.

II.

The Erickson's filed a complaint in federal district court on August 11, 1988, before the decision of the Board. Defendants State of Nevada, Nevada Gaming Control Board, and Caesars filed motions to dismiss the action. The district court granted the motions dismissing the complaint for lack of subject matter jurisdiction due to the Erickson's failure to exhaust the administrative remedies provided by Nevada law. Because The Nevada Supreme Court has issued its decision, the Ericksons now have exhausted their administrative remedies.

We decline to remand this case to the district court, however, because that court provided an alternative ground for dismissing the complaint. The court found that NRS 463.361 limits a plaintiff to an administrative proceeding followed by judicial review in state court. The court therefore determined the Ericksons could not state a claim upon which relief could be granted. Fed. R. Civ.

P. 12(b)(6). The district court held because "plaintiffs claim can most accurately be characterized as an attempt to recover a gaming debt not evidenced by a credit instrument . . . plaintiffs cannot maintain a civil action to recover a jackpot, but instead are limited to an administrative proceeding followed by judicial review."

III.

A.

[1] Appellants assert the Nevada statute should not bar this action because it does not involve a "gaming debt." We agree with the district court that "Nevada characteristically categorizes suits to collect unpaid gambling winnings as gaming debts." *Harrah's Club v. State Gaming Control Bd.*, 104 Nev. Adv. Op. 129, 766 P.2d 900 (1988); *State Gaming Control Bd. v. Breen*, 99 Nev. 320, 323, 661 P.2d 1309, 1311 (1983); *Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 565 (1971). The district court correctly held that NRS 463.361 to 463.3688 limits a plaintiff's recovery of a gaming debt to the exclusive administrative/judicial review procedure contained therein.

B.

[2] Plaintiff's also assert the limitation imposed by NRS 463.361 does not apply in this case because the casino's refusal to pay the slot machine jackpot amounts to fraud. They cite *Berman v. Riverside Casino Corp.*, 323 F.2d 977 (9th Cir. 1963) and *Zaika v. Del E. Webb Corp.*, 508 F.Supp. 1005 (D. Nev. 1981).

In *Berman*, appellant sued a casino to recover money he lost allegedly as a result of the casino's use of "loaded" dice. Although at the time of the action, Nevada made no

statutory provision for suit to recover gambling losses, we held the appellant had properly asserted a cause of action for fraud: "[T]he common law of England, in effect when Nevada became a state is, except as modified by statute or decision of Nevada's courts, the law of Nevada. And the common law rule, as of the time of Nevada's admission to the Union, appears to have been that one who *lost money in a crooked gambling game could recover in a civil action.*" *Id.* at 979 (citations omitted) (emphasis added). *Berman* thus provides for a cause of action for fraud to recover *losses* sustained in a gambling transaction.

[3] *Berman* does not, however, remove this action from the purview of NRS 463.361. The Ericksons did not sue to recover losses sustained as the result of a "crooked gambling game." Rather appellants sought damages for fraud in the amount they *would have won* had Russell been a legal gambler. Whether or not appellees refusal to turn over the casino jackpot amounted to fraud, the remedy sought here is recovery of an alleged gaming debt. Since the passage of NRS 463.361, *any* action to recover such a debt is confined to the administrative process.

Zaika is likewise inapposite. In that case plaintiff claimed he was defrauded by a casino that used an extra card in its blackjack decks. He sought to recover *losses* resulting from the alleged fraud. Appellant filed a claim against the casino, which was rejected by the Board, and then a federal court action for misrepresentation and fraud. Defendant moved for dismissal of the claim, arguing that under the doctrine of res judicata, a decision by an administrative agency (i.e., the Board) that the casino had acted properly should preclude a federal court action.

The district court disagreed. It held that a player who claims she has been cheated by a casino has two distinct remedies: she may pursue a hearing before the Gaming

Control Board, *id.* at 1007-08, or she may bring a civil suit under *Berman.* Zaika pursued the administrative relief and was rebuffed. The district court decided, however, that res judicata would not bar a subsequent civil action: "The opportunity to seek judicial review from an administrative determination is implicit in the doctrine[ ] of res judicata . . . ." *Id.* at 1009. Under NRS 463.315 a casino has a right to judicial review of a Board decision ordering it to pay a claim. The court found, however, that "neither the Nevada statutes nor gaming regulations provide a similar procedure for review to a complainant, such as plaintiff here, who receives an adverse decision from the Gaming Control Board." *Id.* at 1010. Because of this inequality of judicial review the court held res judicata was inapplicable.

[4] *Zaika* simply reaffirms the rule in *Berman* that a party may assert an action outside the administrative process to recover *gambling losses* sustained due to casino fraud. We reiterate, however, the suit in this case does not involve an attempt to recover such losses. We do not believe the Nevada legislature intended to allow parties to avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings. Under NRS 463.361, parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review.

Because NRS 463.361 precludes Appellants' fraud action, they have failed to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). We therefore affirm the decision of the district court.

AFFIRMED.

APPENDIX B

CASE NO. 87-1729-LV

STATE OF NEVADA
BEFORE THE STATE GAMING CONTROL BOARD

* * *

RUSSELL ERICKSON, BETH ERICKSON, and
KIRK ERICKSON,
Petitioners,

vs.

CAESARS PALACE,
Respondent.

DECISION AND ORDER

This matter came before the Hearing Examiner of the State Gaming Control Board on August 23 and 24, 1988, in Las Vegas, Nevada, for a hearing on the merits of the petitioner for reconsideration. Petitioners were present and represented by James P. Sitter, Esq. Respondent, Caesars Palace, appeared through David Butler, Assistant Vice President, and was represented by Robert D. Faiss, Esq., and Marc H. Rubenstein, Esq., of Lionel Sawyer and Collins, and Bruce A. Aguilera, Esq. Having duly considered the evidence presented, the briefs and arguments of counsel, the State Gaming Control Board hereby makes its findings of fact and determination of the issues pursuant to Nevada Revised Statute 463.364(2).

FACTS

Russell and Beth Erickson arrived in Las Vegas, Nevada, on August 5, 1987, from Arkansas, accompanied by their children, Kirk, age 19, Jenny, age 15, and a friend of Jenny's. Kirk and his father went into Caesars Palace to obtain rooms. At the sides of the main entrance through

which they entered and then exited to go back to their car, were signs indicating that it is illegal for a person under 21 years of age to gamble. Sometime later, Kirk and his parents played the "Million Dollar Baby" slot machines. Kirk bought tokens at at least one change booth. Signs on the change booths indicated the legal age for gambling. Kirk is over six feet in height and appears older than his true age.

Kirk played various slot machines at Caesars Palace. There is no evidence to suggest that casino personnel knew or had any reason to believe that Kirk was under 21, due to Kirk's mature appearance. Caesars Palace did not make any false representations to Kirk Erickson or his parents regarding the legal age for gambling.

While playing the "Million Dollar Baby" slot machines, Kirk aligned a jackpot worth $1,061,811.60. The video tape of the incident demonstrates that Kirk sat at the machine for several minutes, and then his father came over and took his place at the machine. While Kirk was gone his father represented that he (the father) was the winner. Russell Erickson signed a W-2G form and a publicity questionnaire as the winner. A crowd gathered around the machine and Kirk's parents. Kirk later returned to the scene but stood in the background. Kirk then left the scene, returned again, and left again, but at no time did he come forward to claim the prize himself, nor indicate to any Caesars' employee that it was he who had been playing the slot machine.

Caesars Palace called the Gaming Control Board after reviewing the video tape which showed that Russell Erickson was not the person playing the slot machine when the jackpot aligned. Agents Abrahamson and Vince arrived to question Mr. Erickson. In response to their questions, Russell Erickson claimed that he had played the machine

when the jackpot aligned. Erickson was informed by the agents that it is a felony in Nevada to claim a jackpot without having made a wager. *See* Nevada Revised Statute 465.070(3) (1987). Erickson continued to maintain that he had won the jackpot. It was only after the agents informed him that there was a video tape which showed that he took the place of someone else at the machine that Erickson admitted it was his son, Kirk, who had been playing the machine.

Russell Erickson still insisted on claiming the jackpot in his own name and on behalf of the family. At that time, Agent Abrahamson indicated that he would deny Russell Erickson's claim because he had not played the machine, and he would deny Kirk's claim because he was under the legal age for gambling. Abrahamson and Vince also informed the Ericksons of their right to appeal any decision to the Board. On August 27, 1987, Agent Abrahamson formally denied the claims of Russell and Kirk Erickson pursuant to Nevada Revised Statute 463.362(2). On September 15, 1987, the office of the Hearing Examiner of the Gaming Control Board received a petition for reconsideration from Kirk Erickson and his parents.

LEGAL ISSUES

With one notable exception, the legal issues involved in this case have been thoroughly briefed by the parties. The Board can discern three distinct legal theories advanced by Petitioners in support of their claim for the jackpot: a contract theory; equitable theories of quasi-contract and unjust enrichment; and, fraud. Considerations of unjust enrichment and fraud also will enter into the Board's consideration of the contract theory as will be discussed in detail below. However, the first step in resolving this dispute is an examination of the applicable statute.

I. Statutory Analysis

Nevada Revised Statute 463.350 provides in part:

> 1. A person under the age of 21 years shall not:
>
> (a) Play, or be allowed to play, any licensed game or slot machine.
>
> (b) Place wagers with or collect winning wagers from any licensed race book, sports pool or pari-mutuel operator.
>
> (c) Loiter, or be permitted to loiter, in or about any room or premises wherein any licensed game, race book, sports pool or pari-mutuel wagering is operated or conducted.
>
> (d) Be employed as a gaming employee except in a counting room.
>
> 2. Any licensee, employee, dealer or other person who violates or permits the violation of any of the provisions of this section and any person, under 21 years of age, who violates any of the provisions of this section is guilty of a misdemeanor.

Nev. Rev. Stat. § 463.350(1), (2) (1987).

To determine whether Kirk Erickson may be awarded the jackpot, the Board first examines the statute for an expression of legislative intent regarding the enforceability of a claim by one who was gambling illegally.

> The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained, will prevail over the literal sense. . . . The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to

> enact it. The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results.

Welfare Div. v. Washoe County Welfare Dep't, 88 Nev. 635, 637-38, 503 P.2d 457, 458-59 (1972) (citations omitted). An examination of the statute at issue indicates that the Legislature intended to prohibit an underage person from both making bets and collecting winnings with regard to all types of gambling games, including slot machines.

The Legislature has specified that an underage person may not (1) play or be allowed to play any licensed game or slot machine, and (2) place wagers with or collect winning wagers from a licensed race book, sports pool, or pari-mutuel operator. *Id.* § 463.350(1)(a), (b). Petitioners argue that when the language of subsection (1)(a) is compared with the language of subsection (1)(b) of Nevada Revised Statute 463.350, one must conclude that the Legislature did not intend that minors be precluded from collecting on their winnings from slot machines or other licensed games, but only from race books, sports pools, and pari-mutuel operations. However, this conclusion does not at all follow when we examine the terminology and other distinctions between slot machines and other gambling games on the one hand, and wagering on racing and sporting events on the other.

The common term used to refer to the activity of gambling at slot machines or licensed games such as 21, poker or keno, is the word "play." One "plays" 21, keno or poker, and one "plays" slot machines. In playing these games, one makes bets and collects winnings. However, the term "play" is not commonly used to refer to gambling at race books and sports pools. One does not "play" race book. Rather, one places a bet with a race book or

sports pool and later collects the winnings. Thus, in order to make it clear that the entire act of gambling at race books and sports pools was prohibited by the statute, the Legislature needed to specifically prohibit both the placing of wagers and the collection of winning wagers. *Id.* § 463.350(1)(b). However, it was not necessary for the Legislature to include similar language in subsection (1)(a), because the concept of "playing" a game or a slot machine includes the entire act of gambling from placing the bet to collecting the winnings.

Furthermore, as Caesars Palace argues, there is a distinction between the manner of gambling on racing and sporting events on the one hand, and other forms of gambling. There is necessarily a time delay between betting on racing and sporting events and the collection of the wager. When a person places a bet with a race book or sports pool, he holds the casino's agreement to pay out on a winning wager in the form of a ticket. The ticket can easily be transferred to another person beyond the control of the licensee. Thus, an underage person could easily possess a winning ticket and attempt to collect the winnings, without having placed a wager, such as where someone places a wager on his behalf. However, slot machines and table games generally pay the player directly and immediately as the game is played out. Therefore, the Legislature had no reason to mention the collection of winnings in subsection (1)(a) of section 463.350. As noted above, collecting the winnings must be considered to be a part of the "playing" of the game, particularly in the context of section 463.350.

Statutory construction must avoid an absurd or unreasonable result, or one that produces "mischief." *State v. Webster*, 102 Nev. 450, 453-54, 726 P.2d 831 (1986); *Welfare Div. v. Washoe County Welfare Dep't*, 88 Nev. at

638. Statutes must be construed to effect their purposes and unlikely, absurd or strained consequences should be avoided. *Alper v. State ex rel. Dep't of Highways*, 96 Nev. 925, 930, 621 P.2d 492 (1980). The unreasonableness of the result produced by one among several possible alternative interpretations of a statute is reason for rejecting that interpretation in favor of another that produces a reasonable result. *Hughes Properties, Inc. v. State*, 100 Nev. 295, 298, 680 P.2d 970 (1984).

The aim of section 463.350 is to prohibit and discourage persons under the age of 21 years from gambling. With respect to achieving this aim, there is no reasonable distinction to be made between licensed games and slot machines on the one hand, and race books, sports pools, and pari-mutuel operations on the other. Although Petitioners argue that Nevada Revised Statute 463.350 was intended to protect, not penalize, minors, it is noteworthy that the statute provides a criminal penalty not only for the licensee, dealer, or other person who permits an underage person to gamble, but also a criminal penalty for the underage individual himself. Nev. Rev. Stat. § 463.350(2) (1987). Furthermore, it is a criminal violation for a person under 21 years of age not only to gamble, but also to loiter about in an area in which gambling is conducted. *Id.* § 463.350(1)(c).

It would be an unreasonable, if not an absurd, result to construe the statute to prohibit a person under 21 years of age from loitering or walking about in gambling areas, from placing wagers or collecting winning wagers from race books, sports pools, or pari-mutuel operators, from placing wagers on other games and slot machines, but not to prohibit this same person from collecting winnings from slot machines or other licensed games. Such a construction would "produce mischief" because it would

serve only to encourage minors to gamble, and is therefore inconsistent with the very purpose of the statute.

Considering the rules of statutory construction, and particularly taking into account the difference in the manner of gambling regarding slot machines and other licensed games on the one hand, and betting on racing and sporting events on the other, and also taking into account the different terminology commonly used to refer to these gambling activities, the Board concludes that section 463.350(1)(a) prohibits a person under the age of 21 from collecting winnings from slot machines or other licensed games. The term "play" was intended to encompass the entire act of gambling, from the placing of the wager to the collecting of the winnings. Thus, the statute itself prohibits the payment of the jackpot to Kirk Erickson under any legal theory, whether that be breach of contract, equitable theories, or fraud. Nevertheless, we examine these theories as alternatives.

II. *Contract Theory*

Petitioners contend that Caesars Palace makes an offer to contract to the public when it exposes slot machines for play and when it sells tokens and the like, and that Kirk Erickson accepted the offer when he played the million dollar baby slot machine, thereby creating an enforceable contract. Caesars Palace denies that any contract was formed, arguing that Caesars Palace did not make an offer to anyone under the age of 21, and that Kirk Erickson was legally incapable of accepting any such offer. The Board need not reach this issue, because even if a contract was formed it is illegal and hence void and unenforceable.

Assuming a contract was formed between Kirk Erickson and Caesars Palace, it was formed in violation of the

statute that prohibits minors from gambling. Under Nevada law, a contract made in contravention of the law does not create a right of action and is void and unenforceable. *Vincent v. Santa Cruz*, 98 Nev. 338, 341, 647 P.2d 379, 381 (1982); *Martinez v. Johnson*, 61 Nev. 125, 129, 119 P.2d 880, 882 (1941). Although Nevada has recognized exceptions to the absolute unenforceability of illegal agreements, the exceptions do not apply to this case.

Martinez v. Johnson involved a statute which limited the hours that women could work in private employment. The court stated that the statute was an exercise of the police power of the state for the preservation of the health of female workers in private employment in the interest of the public welfare. 61 Nev. at 129. Furthermore, the employer alone was made criminally liable for violation of the statute. *Id.* at 129-30. Nevertheless, the court upheld the district court's denial of Martinez' claim for wages for hours in excess of the statutory maximum, even though the statute did not expressly prohibit such payment, the employer clearly was unjustly enriched by having the benefit of the labor without having to pay for it, and in spite of finding that the parties were not equally at fault, not "in pari delicto."

The *Martinez* court acknowledged exceptions to the doctrine of the unenforceability of illegal contracts such as where the applicable statute is not affected with the public interest, the plaintiff and defendant are not on equal terms, the public interest would be best served by allowing plaintiff to recover, and if there are intervening elements of duress, deception, or the like. *Martinez v. Johnson*, 61 Nev. at 131. The court found that none of these exceptions applied.

The case before this Board is even a stronger case for applying the illegal contract doctrine than the *Martinez* case. Here, the statute imposes a criminal penalty even on the minor who gambles, indicating that the statute is designed not principally to protect particular minors, but is intended to protect the general public welfare. *Martinez* involved an employment relationship, in which one might perceive that the employee is in need of the extra wages, yet the court found there was no intervening element of duress. 61 Nev. at 131. The case before this Board involves gambling, a recreational activity, and there is certainly no element of duress here.

The *Martinez* court recognized an exception if the public interest would be served best by allowing the plaintiff to recover. *Id.* The statute at issue here, Nevada Revised Statute 463.350, has at least one purpose to protect minors from the corruptive influences of gambling, but also to protect the public welfare. As noted above, to enable a person who has been gambling illegally to then collect his winnings disserves, rather than serves, the public interest. It would undercut the efforts of the state and the casinos in their attempts to discourage gambling in violation of the statute, and it would encourage minors to take the risk that they can gamble successfully even if they are caught. The public interest is best served by denying a recovery, thus sending a message to persons who might be tempted to gamble in violation of the law, that they are engaging in a useless act since they would not be paid their winnings even if they were successful.

Finally, this case does not contain an element of deception or fraud. Caesars Palace did not make any false representations to Kirk Erickson or his parents. Caesars did not even have a reason to know that Kirk was

underage, due to Kirk's mature appearance. Caesars Palace had signs placed near the gambling areas that informed patrons of the law regarding underage gambling. Although Petitioners contend they were ignorant of the law, and that Caesars' signs were inadequate, these factors, even if true, do not amount to the kind of fraud or deception that would tip the equities of this case in favor of Kirk Erickson, and allow him to receive the jackpot in spite of the public interest against doing so. Under the circumstances of this case, Kirk must be presumed to know the law. To allow otherwise, would be inconsistent with the aim of section 463.350 and would undermine its purpose.[1]

III. *Equitable Remedies*

The Petitioners' theories of quasi-contract, restitution or unjust enrichment cannot provide them with the remedy they seek, namely, payment of the jackpot. The Nevada Supreme Court has recognized that in certain cases, a person may bring an action for recovery under the theory of unjust enrichment, even if one may not sue directly on a contract because it is illegal. *Magill v. Lewis*,

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[1]Although in a criminal prosecution for the violation of section 463.350 one may not set up as a defense that he believed the person to be of legal age, *see* Nevada Revised Statute 463.350(3), Caesars Palace's reasonable belief that Kirk was at least 21 is relevant to Caesars' state of mind with respect to Petitioners' allegations of "fraud and deceit" and in examining the equities of this case. Furthermore, although Petitioners testified that they believed that the legal age for gambling is 18, the deceptive behavior of Petitioners after Kirk won the jackpot, including Russell Erickson's insistence that he had won, is evidence from which the Board can infer that Kirk and his parents knew that Kirk was gambling illegally.

74 Nev. 381, 333 P.2d 717 (1958). This case does not help Petitioners.

First, the statute at issue in *Magill* specifically prohibited only a breach of contract action. Second, the plaintiffs there alleged fraud on the part of the owners of the building who had received the benefit of the contractors' work: They had been informed that one of the contractors was not licensed, and had assured the contractors that the possession of a Nevada license was immaterial and that they would not set up the lack of such license adversely to the contractors. In addition, the Lewises clearly would have been unjustly enriched if they did not pay the contractors the value of their labor and materials, because the contractors had already completed the work and expended money for the benefit of the Lewises.

The situation described in *Magill v. Lewis* is simply not analogous to the matter before the Board. In particular, Caesars Palace did not engage in any fraud against the Petitioners, and did not make any representations to Kirk or his parents analogous to those involved in *Magill.* For example, Caesars did not acknowledge to Kirk that he was underage and then assure him that he could gamble with impunity, and that Caesars would not set up his age as a defense to Kirk's claim. Caesars could not even be said to have made these representations by implication, because, as noted above, Caesars had no reason to know that Kirk was underage, due to Kirk's mature appearance.

Most significant, however, is the fact that except for three $1 tokens used by Kirk Erickson to play the machine where the jackpot at issue occurred, Caesars Palace was not enriched by the subject transaction. The theory of quasi-contract, restitution, or unjust enrichment, is based on the principle that when one confers a benefit on

another in circumstances under which it would be unjust to allow that party to retain that benefit, the first party may be awarded the value of the benefit conferred or may get back the benefit conferred. *See generally*, 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 1-3 (1973); 22 Am. Jur. 2d *Damages* §§ 54, 55 (1988). In *Magill v. Lewis,* for example, the owners of the property had induced the contractors to build a casino, bar, and restaurant which they sought to retain without fully paying for the value of the contractors' work. *Magill* is a clear case where one party would be unjustly enriched by retaining a benefit without paying for it. In the case before the Board, however, Kirk asks to be awarded the jackpot. He does not seek restitution of the benefit he conferred upon Caesars Palace, namely the three $1 tokens.[2]

By seeking the jackpot worth over one million dollars, Kirk clearly is stating an action on a contract. He seeks the "benefit of the bargain;" his contractual expectation interest. *See* 22 Am. Jur. 2d *Damages, supra,* §§ 43-49. The Board recognizes that under some circumstances, an element of unjust enrichment may be a consideration in whether an illegal agreement or contract itself may be enforced. *Magill v. Lewis,* 74 Nev. at 386 (citing and quoting with approval *Norwood v. Judd,* 93 Cal.App.2d 276, 209 P.2d 24, 31 (1949)). However, as discussed above, this is not a case where to deny Kirk's claim would be to allow Caesars Palace to be unjustly enriched *at the expense* of Kirk. *Magill* 74 Nev. at 386. Caesars Palace did not receive any benefit from Kirk Erickson valued at $1,061,811.60, the amount of the jackpot. This money belongs, in the first instance, to Caesars Palace.

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[2]The Board makes no decision whether it would amount to "unjust enrichment" for Caesars Palace to retain the three dollars.

IV. *Fraud*

A fraud theory, like an unjust enrichment theory, cannot stand alone as a separate action under which Kirk may recover the jackpot. First, to establish fraud, Kirk must prove, among other things, that Caesars Palace made a false representation to him. This is one of many elements of fraud. *See Sanquinetti v. Strecker,* 94 Nev. 200, 577 P.2d 404 (1978). The Board has found that Caesars Palace did not make any false representations to Kirk Erickson. In particular, Caesars did not represent to Kirk that it was legal for persons under the age of 21 to gamble. As discussed above, because of Kirk's mature appearance, Caesars Palace did not have any reason to believe that Kirk was under 21. Nor did Caesars Palace represent to Kirk that it would not use his age against him if he won.

Finally, even if Kirk could prove all the elements of fraud, he would be entitled to recover only the loss caused by the fraud, namely, compensation that would place Kirk in the position he would have occupied if the fraud had not occurred. *See* 22 Am. Jur. 2d *Damages, supra,* § 130. Here, Kirk has not lost one million dollars as a result of Caesars Palace's alleged fraud. At best, Kirk lost three $1 tokens. As discussed above under the unjust enrichment theory, Kirk's claim for the jackpot itself is a claim for his contractual expectation interest, it is not a claim for compensation for injury caused by a tortious act of Caesars Palace. *See Taylor v. James F. Byrnes Academy, Inc.,* 349 S.E. 2d 888, 891 (S. Carolina App. 1986). Again, the Board recognizes that an element of fraud or deceit may be relevant as a factor when considering whether an illegal contract should be enforced. The Board has considered Petitioners' allegations of fraud in this context as

well, see discussion *supra*, but finds no fraud or deception on the part of Caesars Palace.

V. *Claim of Russell and Beth Erickson*

The parents of Kirk Erickson, namely Russell Erickson and Beth Erickson, include themselves as petitioners in this action. All three Petitioners testified that they had an agreement to divide any gambling winnings among them. The parties did not provide points and authorities on the issue whether Kirk's parents should be allowed to recover the jackpot or part of it.

Normally, the "patron" involved in disputes covered by Nevada Revised Statutes 463.361-.364 is the person who made the wager on which the licensee refuses to pay. It is questionable whether any third parts has standing to enforce the claim. Furthermore, in this case, any agreement between Kirk and his parents to the effect that if Kirk won, they would divide the winnings, is itself illegal, because it necessarily requires an illegal act on the part of Kirk. The parents should not be allowed to set up this illegal agreement as a way of conferring standing on themselves. In addition, Kirk's gambling was illegal and hence void from a legal perspective. No one can step into Kirk's place to claim the benefit of that void act. Finally, to allow a third party to claim the jackpot under these circumstances clearly would undermine the public policy behind section 463.350, as would direct payment to the underage gambler himself.

DECISION

For the reasons described herein, and good cause appearing,

IT IS THE ORDER of the Gaming Control Board that the agent's decisions are affirmed and that the claims of Petitioners, Russell, Beth, and Kirk Erickson, for the jackpot in the amount of $1,062,811.60 are denied.

DATED this 9th day of November, 1988.

STATE GAMING CONTROL BOARD

MICHAEL D. RUMBOLZ

MICHAEL D. RUMBOLZ, Chairman

DENNIS L. AMERINE

DENNIS L. AMERINE, Member

GERALD H. CUNNINGHAM

GERALD H. CUNNINGHAM, Member

Submitted by:

By: JOHN TATRO

JOHN TATRO
Hearing Examiner
State Gaming Control Board

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RUSSELL ERICKSON, et. al.,
Plaintiffs,

vs.

DESERT PALACE, INC., et al.,
Defendants.

CV-S-88-660-LDG

ORDER

On August 11, 1988, plaintiffs RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON filed a complaint against defendants DESERT PALACE, INC., CAESARS PALACE, CAESARS PALACE CORPORATION, DONALD ABRAHAMSON, MARIAN VINCE, STATE OF NEVADA, and NEVADA GAMING CONTROL BOARD. Plaintiffs brought this action after they were refused a slot machine jackpot in the amount of $1,061,812.00 because KIRK ERICKSON, the player of the slot machine, was underage.

The complaint alleges five claims for relief. The first through fourth claims for relief are based upon state law claims for breach of contract, quasi-contract, "fraud and cheating," and interference with contract, respectively. The fifth claim for relief seeks a declaratory judgment. This matter comes before the court on motions to dismiss filed by the defendants for failure to state a claim and for lack of subject matter jurisdiction.

DISCUSSION

Plaintiffs assert diversity jurisdiction in this matter and therefore it is controlled by substantive Nevada law. *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). Although plaintiffs' first four claims are couched in terms of contract, quasi-contract, fraud, and interference with contract, the court finds that plaintiffs' claims can most accurately be characterized as an attempt to recover a gaming debt not evidenced by a credit instrument. Under Nevada law, gaming debts are unenforceable except as provided by statute. Nevada Revised Statute 463.361(1) specifically states that: "Except as provided in NRS 463.361 to 463.366, inclusive, gaming debts not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action." Thus, plaintiffs cannot maintain a civil action to recover a jackpot, but instead are limited to an administrative proceeding followed by judicial review as provided by NRS Sections 463.361 to 463.3668. Accordingly, the court finds that plaintiffs first four claims do not state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Furthermore, the Ninth Circuit has stated that "[s]tatutory exhaustion requirements implicate concerns of separation of powers, and therefore, the failure to comply with the requirements deprives [the court] of jurisdiction." *Marathon Oil Co. v. United States*, 807 F.2d 759, 769 (9th Cir. 1986), *cert. denied,* 107 S. Ct. 1593 (1987). See also *State Indust. Ins. System v. Sleeper,* 100 Nev. 267, 679 P.2d 1233 (1984). Therefore, the court lacks subject matter jurisdiction over plaintiffs' first four claims for relief. Fed. R. Civ. P. 12(b)(1).

Likewise, the court also lacks subject matter jurisdiction over plaintiffs' fifth claim seeking declaratory relief.

The Declaratory Judgment Act does not provide an independent basis for jurisdiction in federal court. *State of California v. Oroville-Wyandotte Irrigation Dist.*, 409 f.2d 532, 535 (9th Cir. 1969). The fact that plaintiffs' couch their claim in constitutional terms is of no effect. As the Fifth Circuit noted in *Earnest v. Lowentritt*, 690 F.2d 1198 (5th Cir. 1982), the Declaratory Judgment Act "does not provide an independent cause of action for determination of the constitutionality of a statute, but rather is only an avenue for relief in a 'case of actual controversy within [the court's] jurisdiction.'" *Id.* at 1203 (quoting 28 U.S.C. § 2201).

Furthermore, even if this court had jurisdiction to provide declaratory relief, the plaintiffs would still be required to exhaust applicable state remedies. "[A] sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system." *State of California*, 409 F.2d at 536. See also *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952). The court must assume that the review procedures set forth in NRS 463.361 to 463.3668 will adequately protect plaintiffs' constitutional rights because "[s]tate courts are bound equally with the federal courts by the Federal Constitution and laws." *Id.* at 247-8.

Plaintiffs contend that regardless of whether NRS Sections 463.361 through 463.3668 apply to their claims, this court has "inherent equity jurisdiction under substantive Nevada law to take command of this lawsuit." Plaintiffs Opposition (#7) at 9, lines 3-4. This court strongly disagrees. As stated succinctly by the court in *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 737 (E.D.N.Y. 1979), "[f]ederal courts have no independent 'equity jurisdiction'; they may grant equitable relief,

but not unless there is an independent statutory basis for federal jurisdiction, which is conferred only by specific congressional enactment." *Id.* at 740.

For the reasons stated above,

IT IS HEREBY ORDERED that defendants' motions to dismiss (#2, 3) are granted and the plaintiffs' complaint is dismissed without prejudice.

Dated: 8 March 1989.

LLOYD D. GEORGE

LLOYD D. GEORGE
United States District Judge

C-5

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RUSSELL ERICKSON, et al.,
Plaintiffs,

vs.

DESERT PALACE, INC., et al.,
Defendants.

CV-S-88-660-LDG

ORDER

BACKGROUND

This order is in response to plaintiffs RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON's motion for reconsideration of this court's March 9, 1989 dismissal of their action against defendants DESERT PALACE, INC., CAESAR'S PALACE, CAESAR'S PALACE CORPORATION, DONALD ABRAHAMSON, MARIAN VINCE, STATE OF NEVADA and NEVADA GAMING CONTROL BOARD. Plaintiffs brought their initial action after Caesar's Palace refused to pay a slot machine jackpot of $1,061,812 because KIRK ERICKSON, the player of the slot machine, was underage.

This court dismissed that action because it was "an attempt to recover a gaming debt not evidenced by a credit instrument" (#16 at 2) and, as such, plaintiff's cognizable actions were limited by Nevada Revised Statute 463.361(1) to a state administrative proceeding followed by judicial review.

Additionally, this court lacked subject matter jurisdiction over the case because these explicit state statutory requirements must be exhausted before remedy in any

federal forum is sought. *Marathon Oil Co. v. United States*, 807 F.2d 759, 769 (9th Cir. 1986).

Plaintiff's current motion alleges clear error in this court's dismissal, advancing two propositions: (1) An action seeking payment of an unpaid slot machine jackpot is not an attempt to recover a gaming debt; (2) Instead this is a civil action for cheating and can be heard in federal court.

DISCUSSION

Plaintiff claims that the Nevada Supreme Court treats only transactions in which "one party loaned money to another party to enter into wagering between themselves," as gaming debts. *Sigel v. McEvoy*, 101 Nev. 623, 707 P.2d 1145 (1985). This Court must disagree. Nevada characteristically categorizes suits to collect unpaid gambling winnings as gaming debts. *Harrah's Club v. State Gaming Control Board*, 104 New. Adv. Op. 129, 766 P.2d 900 (1988) (unpaid slot machine jackpot is gaming debt); *State Gaming Control Board v. Breen*, 99 Nev. 320, 661 P. 2d 1309 (1983) (unpaid keno winnings are gaming debt); *Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 565 (1971) (unpaid earnings on a sports wager are gaming debt). This court is obliged to follow Nevada's characterization of its own law and will do so in this case.

Because precedent regarding an unpaid slot machine jackpot as a gaming debt is so convincing, this court refuses to engage in speculation about the effect of regarding such a factual situation as cheating on the casino's part.

For the above reasons,

IT IS ORDERED that plaintiff's motion for reconsideration (#18) be denied.

Dated: 4 July 1989

LLOYD D. GEORGE

LLOYD D. GEORGE
United States District Judge

APPENDIX D

DISTRICT COURT
CLARK COUNTY, NEVADA

RUSSELL ERICKSON, BETH ERICKSON
and KIRK ERICKSON,

Petitioners,

v.

Caesars Palace,
Respondent.

CASE NO. A 270429
DEPT. NO. XIV
CIVIL DOCKET "T"

ORDER

DATE OF HEARING: JUNE 27, 1989
TIME OF HEARING: 10:00 A.M.

This Petition for Judicial Review pursuant to NRS 463.3662 through 463.3666 having come before the Court for oral argument on June 27, 1989, and the parties having been represented by their respective counsel, James P. Sitter of the law firm of James P. Sitter, Chartered on behalf of Petitioners Russell Erickson, Beth Erickson, and Kirk Erickson, Robert D. Faiss and Marc H. Rubinstein of the law firm of Lionel Sawyer & Collins on behalf of Respondent Caesars Palace, and Deputy Attorney General Gloria Stendardi on behalf of amicus curiae State Gaming Control Board ("Board"), and the Court having considered the Board's Decision and Order dated November 9, 1988, the record on review, the parties' briefs, and the oral argument of counsel, and good cause appearing therefor,

IT IS ORDERED that the Board's Decision and Order be, and hereby is, affirmed.

DATED this 30th day of June, 1989.

_____
DISTRICT COURT
JUDGE

Submitted by:

LIONEL SAWYER &
COLLINS

By: _____
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Respondent,
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Approved as to form and content:

JAMES P. SITTER, CHARTERED

By: _____

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6773-B W. Charleston Blvd., Las Vegas, Nevada 89102

Attorneys for Petitioners, Russell Erickson, Beth Erickson and Kirk Erickson

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEVADA

RUSSELL ERICKSON, BETH ERICKSON
and KIRK ERICKSON,
Appellants,

vs.

CAESARS PALACE,
Respondent.

No. 20382

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court affirming a decision by the Nevada Gaming Control Board to deny appellants' claim to a jackpot.

Appellants contend on appeal that the gaming control board erred in concluding that NRS 463.350 prevents them from collecting the jackpot. Before being amended in 1989, NRS 463.350 stated that it was unlawful for a person under the age of twenty-one years to "[p]lay, or be allowed to play, any licensed game or slot machine." The board reasoned that the concept of "playing" a slot machine includes the entire act of gambling, from placing the bet to collecting the winnings. The board therefore concluded that NRS 463.350 prevents appellants from collecting the jackpot. This court has previously stated that great deference should be given to an administrative agency's interpretation of a statute administered by the agency when the interpretation is within the language of the statute. *See* State v. Morros, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Because the word "play" fairly includes the collection of winnings from a slot machine as well as the making of bets, we conclude that NRS 463.350

prohibits appellants from collecting the jackpot. Our resolution of this issue makes it unnecessary to address appellants' *in pari delicto* argument.

Appellants next contend that the board's decision violated their constitutional rights to due process and equal protection. Appellants' opening brief does not contain any citation to relevant authority in support of this contention. It is therefore within the prerogative of this court to refuse to consider it. *See* Ivory Ranch v. Quinn River Ranch, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985). Nevertheless, we have considered appellants' contention and have concluded that it is without merit.

Finally, appellants contend that respondent is engaged in the exploitation of minors. Appellants therefore contend that public policy requires that the jackpot be paid to them. As the district court noted, however, appellants did not introduce specific evidence showing that respondent knowingly allowed Kirk Erickson to gamble while underage. In the absence of such evidence, this contention is without merit.

Appellants' contentions lacking merit, we ORDER this appeal dismissed.[1]

YOUNG, C.J.
Young

STEFFEN, J.
Steffen

SPRINGER, J.
Springer

MOWBRAY, J.
Mowbray

cc: Hon. Donald M. Mosley, District Judge
Hon. Brian McKay, Attorney General
Lionel Sawyer & Collins
James P. Sitter
Loretta Bowman, Clerk

---

[1]The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ERICKSON; BETH ERICKSON;
KIRK ERICKSON,
Plaintiffs-Appellants,

vs.

DESERT PALACE, INCORPORATED; CAESARS PALACE,
a Nevada corporation;
CAESARS PALACE CORPORATION,
a Delaware corporation;
DONALD ABRAHAMSON; MARIAN VINCE,
formerly known as Marian Fourno;
STATE OF NEVADA; NEVADA GAMING
CONTROL BOARD
Defendant-Appellees

No. 89-16053
D.C. No. CV-S-88-0660-LDG

ORDER

BEFORE: ALDISERT*, ALARCON, and BRUNETTI, Circuit Judges Appellants' petition for rehearing is denied.

*Honorable Ruggero J. Aldisert, United States Circuit Judge for the Third Circuit, sitting by designation.

APPENDIX G

GAMING; HORSE RACING; SPORTING EVENTS

RECOVERY OF GAMING DEBTS BY PATRONS

463.361. Enforceability and resolution of gaming debts.

1. Except as otherwise provided by NRS 463.361 to 463.366, inclusive, gaming debts that are not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action.

2. A claim by a patron of licensee for payment of a gaming debt that is not evidenced by a credit instrument may be resolved in accordance with NRS 463.362 to 463.366, inclusive:

(a) By the board; or

(b) If the claim is for less than $500, by a hearing examiner designated by the board. (1983, p. 1846; 1991, ch. 357 § 9, p. 929.)

Effect of amendment — The 1991 amendment, in subsection 1, inserted "otherwise," and inserted "that are"; in subsection 2 in the introductory language, inserted "that is," and deleted "by the board" following "may be resolved," and added subdivisions 2(a) and 2(b).

463.362. Refusal by licensee to pay alleged winnings; investigation; resolution of dispute by board's agent.

1. Whenever a licensee refuses payment of alleged winnings to a patron, the licensee and the patron are unable to resolve the dispute to the satisfaction of the patron and the dispute involves:

(a) At least $500, the licensee shall immediately notify the board; or

(b) Less than $500, the licensee shall inform the patron of his right to request that the board conduct an investigation.

The board, through an agent, shall conduct whatever investigation it deems necessary and shall determine whether payment should be made.

2. The agent of the board shall mail written notice to the board, the licensee and the patron of his decision resolving the dispute within 30 days after the date the board first receives notification from the licensee or a request to conduct an investigation from the patron. The failure of the agent to mail notice of his decision within the time required by this subsection does not divest the board of its exclusive jurisdiction over the dispute.

3. Failure of the licensee to notify the board or inform the patron as provided in subsection 1 is grounds for disciplinary action pursuant to NRS 463.310 to 463.3145, inclusive.

4. The decision of the agent of the board is effective on the date the aggrieved party receives notice of the decision.

Notice of the decision shall be deemed sufficient if it is mailed to the last known address of the licensee and patron. The date of mailing may be proven by a certificate signed by an officer or employee of the board which specifies the time the notice was mailed. The notice shall be deemed to have been received by the licensee or the patron 5 days after it is deposited with the United States Postal Service with the postage thereon prepaid. (1983, p. 1486; 1985 p. 1797; 1987, ch. 110 § 5, p. 188; 1989, ch. 590, § 1, p. 1264; 1991, ch. 357, § 10, p. 929; 1991, ch. 645, § 3, p. 2146.)

Editor's note. — This section was amended by two 1991 acts which do not appear to conflict and have been compiled together.

Effective date. — Acts 1991, ch. 357, § 10 became effective October 1, 1991. Acts 1991, ch. 645, § 3 became effective at 12:01 a.m. on October 1, 1991, pursuant to ch. 645, § 10(3).

Effect of amendment. — The 1991 amendment by ch. 357, § 10, deleted the former second sentence of subsection 4 which read: "The date of receipt is presumed to be the date specified on the return receipt"; and substituted "notice shall be deemed" for "notice is presumed" in the last sentence of subsection 5.

The 1991 amendment by ch. 645 § 3, added the second sentence to subsection 2; in subsection 3, inserted "of the licensee" and inserted "inform the"; deleted the former subsection 5 designation preceding the second sentence of subsection 4, and deleted "of the agent of the board" preceding "shall be deemed sufficient" in the second sentence of subsection 4.

463.363. Petition for hearing by board; notice and conduct of hearing.

1. Within 20 days after the date of receipt of the written decision of the agent, the aggrieved party may file a petition with the board requesting a hearing to reconsider the decision.

2. The petition must set forth the basis of the request for reconsideration.

3. If no petition for reconsideration is filed within the time prescribed in subsection 1, the decision shall be deemed final action on the matter and is not subject to

reconsideration by the board or to review by the commission or any court.

4. The party requesting the hearing must provide a copy of the petition to the other party.

5. Within 15 days after service of the petition, the responding party may answer the allegations contained therein by filing a written response with the board.

6. The board shall schedule a hearing and may conduct the hearing as provided in subsection 4 of NRS 463.110, except that notice of the date, time and place of the hearing must be provided by the board to both parties.

7. The hearing must be conducted in accordance with regulations adopted by the commission. (1983, p. 1846; 1987, ch. 110, § 6, p. 188; 1989, ch. 590, § 2, p. 1265; 1991, ch. 645, § 4, p. 2146.)

Effect of amendment — The 1991 amendment substituted "regulations adopted by the commission" for "NRS 463.3125, 463.313, 463.3136 and 463.314, subsection 4 of NRS 463.312 and subsection 2 of NRS 463.3133, except that the board must be substituted for the commission" in subsection 7.

463.364. Burden of proof on party seeking reconsideration; decision of board or hearing examiner.

1. The party seeking reconsideration bears the burden of showing that the agent's decision should be reversed or modified.

2. After the hearing, the board or the hearing examiner may sustain, modify or reverse the agent's decision. The decision by the board or the hearing examiner must be in writing and must include findings of fact. A copy of the decision must be delivered or mailed forthwith to each

party or to his attorney of record. (1983, p. 1847; 1991, ch. 357, § 11, p. 930.)

Effect of amendment. — The 1991 amendment, in subsection 2, inserted "or the hearing examiner" in the first and second sentences, and deleted "board's" preceding "decision must be delivered" in the last sentence.

463.366. Payment of claim after decision of board or hearing examiner becomes final; deposit and withdrawal of amount of claim upon judicial review.

1. Except as otherwise provided in subsection 2, a licensee shall pay a patron's claim within 20 days after the decision of the board or the hearing examiner directing him to do so becomes final. Failure to pay within that time is grounds for disciplinary action pursuant to NRS 463.311 to 463.3145, inclusive.

2. If a licensee intends to file a petition for judicial review of the decision pursuant to NRS 463.3662 to 463.3668, inclusive, the licensee must first deposit in an interest-bearing account in a financial institution an amount equal to the amount in dispute. The licensee shall pay the full amount of the patron's claim, including interest, within 20 days after a final, nonappealable order of a court of competent jurisdiction so directs.

3. The licensee may withdraw the amount deposited in the financial institution upon:

(a) Payment of the full amount of the patron's claim, plus interest, if the licensee has given notice to the board of the payment; or

(b) A final determination by the court that the licensee is not required to pay the claim. (1983,

p. 1847; 1987, ch. 550, § 5, p. 1275; 1989, ch. 48, § 27, p. 98; 1991, ch. 357, § 12, p. 930.)

Effect of amendment. — The 1991 amendment inserted "or the hearing examiner" in the first sentence of subsection 1, and deleted "board's" preceding "decision" in the first sentence of subsection 2.

463.3662. Judicial review: Petition; intervention; stay of enforcement.

1. Any person aggrieved by a final decision or order of the board or the hearing examiner made after hearing by the board pursuant to NRS 463.361 to 463.366, inclusive, may obtain a judicial review thereof in the district court of the county in which the dispute between the licensee and patron arose.

2. The judicial review must be instituted by filing a petition within 20 days after the effective date of the final decision or order. The petition must set forth the order or decision appealed from and the grounds or reasons why the petitioner contends that a reversal or modification should be ordered.

3. Copies of the petition must be served upon the board and all other parties of record, or their counsel of record, either personally or by certified mail.

4. The court, upon a proper showing, may permit other interested persons to intervene as parties to the appeal or as friends of the court.

5. The filing of the petition does not stay enforcement of the decision or order of the board or the hearing examiner, but the board itself may grant a stay upon such terms and conditions as it deems proper. (1987, ch. 551, § 2, p. 1276; 1989, ch. 590, § 3, p. 1265; 1991, ch. 357, § 13, p. 930.)

463.3664. Judicial review: Record on review.

1. Upon written request of petitioner and upon payment of such reasonable costs and fees as the board may prescribe, the complete record on review, or such parts thereof as are designated by the petitioner, must be prepared by the board.

2. The complete record on review must include copies of:

(a) All pleadings in the case;

(b) All notices and interim orders issued by the board in connection with the case;

(c) All stipulations;

(d) The decision and order appealed from;

(e) A transcript of all testimony, evidence and proceedings at the hearing;

(f) The exhibits admitted or rejected; and

(g) Any other papers in the case.

The original of any document may be used in lieu of a copy thereof. The record on review may be shortened by stipulation of all parties to the review proceedings.

3. The record on review must be filed with the reviewing court within 30 days after service of the petition for review, but the court may allow the board additional time to prepare and transmit the record on review. (1987, ch. 551, § 3, p. 1276.)

Effective date. — This section became effective June 16, 1987.

Effect of amendment. — The 1991 amendment inserted "or the hearing examiner" in subsections 1 and 5, and substituted "why the petitioner contends that a reversal"

for "why petitioner contends a reversal" in the second sentence of subsection 2.

463.3666. Judicial review: Additional evidence taken by board or hearing examiner; review confined to record; court may affirm, remand or reverse.

1. The reviewing court may, upon motion therefor, order that additional evidence in the case be taken by the board or the hearing examiner upon such terms and conditions as the court deems just and proper. The motion must not be granted except upon a showing that the additional evidence is material and necessary and that sufficient reason existed for failure to present the evidence at the hearing conducted by the board or the hearing examiner. The motion must be supported by an affidavit of the moving party or his counsel showing with particularity the materiality and necessity of the additional evidence and the reason why it was not introduced in the administrative hearing. Rebuttal evidence to the additional evidence must be permitted. In cases in which additional evidence is presented to the board or the hearing examiner, the board or the hearing examiner may modify the decisions and orders as the additional evidence may warrant and shall file with the reviewing court a transcript of the additional evidence together with any modifications of the decision and order, all of which become a part of the record on review.

2. The review must be conducted by the court sitting without a jury, and must not be a trial de novo but is confined to the record on review. The filing of briefs and oral argument must be made in accordance with the rules governing appeals in civil cases unless the local rules of practice adopted in the judicial district provide a different procedure.

3. The reviewing court may affirm the decision and order of the board or the hearing examiner, or it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:

(a) In violation of constitutional provisions;

(b) In excess of the statutory authority or jurisdiction of the board or the hearing examiner;

(c) Made upon unlawful procedure;

(d) Unsupported by any evidence; or

(e) Arbitrary or capricious or otherwise not in accordance with law.

(1987, ch. 551, § 4, p. 1277; 1991, ch. 357, § 14, p. 931; 1991, ch. 645, § 5, p. 2147.)

Editor's note. — This section was amended by two 1991 acts which do not appear to conflict and have been compiled together.

Effective date. — Acts 1991, ch. 357, § 14 became effective October 1, 1991. Acts 1991, ch. 645, § 5 became effective at 12:01 a.m. on October 1, 1991, pursuant to ch. 645, § 10(3).

Effect of amendment. — The 1991 amendment by ch. 357, § 14, inserted "or the hearing examiner" throughout this section; in subsection 1, substituted "at the hearing conducted by the board" for "at the hearing of the board" in the second sentence, and substituted "the decisions and orders" for "its decisions and orders" in the last sentence.

The 1991 amendment by ch. 645, § 5, substituted "deems just" for "may deem just" in the first sentence of

subsection 1, and added the second sentence to subsection 2.

463.3668. Judicial review: Appeal; exclusive method of review; costs to transcribe proceedings and transmit record.

1. Any party aggrieved by the final decision in the district court after a review of the decision and order of the board or the hearing examiner may appeal to the supreme court in the manner and within the time provided by law for appeals in civil cases. The supreme court shall follow the same procedure thereafter as in appeals in civil actions, and may affirm, reverse or modify the decision as the record and law warrant.

2. The judicial review by the district and supreme courts afforded in this chapter is the exclusive method of review of any actions, decisions and orders in hearings held pursuant to NRS 463.361 to 463.366, inclusive. Judicial review is not available for extraordinary common law writs or equitable proceedings.

3. The party requesting judicial review shall bear all of the costs of transcribing the proceedings before the board or the hearing examiner and of transmitting the record on review. (1987, ch. 551, § 5, p. 1277; 1991, ch. 357, § 15, p. 931.)

Effect of amendment. — The 1991 amendment inserted "or the hearing examiner" in the first sentence of subsection 1 and in subsection 3; and substituted "review of any actions" for "review of the board's actions" in the first sentence of subsection 2.

RECOVERY OF GAMING DEBTS BY LICENSEES

463.367. "Credit instrument" defined. Repealed by Acts 1991, ch. 303, § 8, p. 801.

Cross references — As to present provision defining "credit instrument," see NRS 463.01467.

463.368. Credit instruments: Validity; enforcement; redemption; penalties.

1. A credit instrument accepted on or after June 1, 1983, and the debt that the credit instrument represents are valid and may be enforced by legal process.

2. A licensee or a person acting on behalf of a licensee may accept an incomplete credit instrument which:

(a) Is signed by a patron; and

(b) States the amount of the debt in figures, and may complete the instrument as is necessary for the instrument to be presented for payment.

3. A licensee or person acting on behalf of a licensee:

(a) May accept a credit instrument that is dated later than the date of its execution if that later date is furnished at the time of the execution of the credit instrument by the patron.

(b) May not accept a credit instrument which is incomplete and cannot lawfully be completed to comply with the requirements of NRS 104.3104.

(c) May accept a credit instrument that is payable to an affiliated company or may complete a credit instrument in the name of an affiliated company as payee if the credit instrument otherwise complies with this subsection and the records of the affiliated

company pertaining to the credit instrument are made available to agents of the board upon request.

(d) May accept a credit instrument either before, at the time, or after the patron incurs the debt. The credit instrument and the debt that the credit instrument represents are enforceable without regard to whether the credit instrument was accepted before, at the time or after the debt is incurred.

4. This section does not prohibit the establishment of an account by a deposit of cash, recognized traveler's check, or any other instrument which is equivalent to cash.

5. If a credit instrument is lost or destroyed, the debt represented by the credit instrument may be enforced if the licensee or person if acting on behalf of the licensee can prove the existence of the credit instrument.

6. A patron's claim of having a mental or behavioral disorder involving gambling:

(a) Is not a defense in any action by a licensee or a person acting on behalf of a licensee to enforce a credit instrument or the debt that the credit instrument represents.

(b) Is not a valid counterclaim to such an action.

7. Any person who violated the provisions of this section is subject only to the penalties provided in NRS 463.310 to 463.318, inclusive.

The failure of a person to comply with the provisions of this section or the regulations of the commission does not invalidate a credit instrument or affect the ability to enforce the credit instrument or the debt that the credit instrument represents.

8. The commission may adopt regulations prescribing the conditions under which a credit instrument may be redeemed or presented to a bank for collection or payment. (1983, p. 828; 1985, p. 798; 1989, ch. 181, § 1, p. 400; 1991, ch. 314, § 1, p. 817.)

Effective date. — The 1991 amendment became effective June 11, 1991.

Effect of amendment. — The 1991 amendment, in subsection 1, substituted "and the debt that the credit instrument represents are valid" for "is valid"; substituted "on behalf of a licensee" for "on the licensee's behalf" in the introductory sentence of subsection 2; added subdivision 3(d); added present subsections 5 and 6, and redesignated the former subsections 5 and 6 as the present subsections 7 and 8, respectively.

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-1184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL ERICKSON, *et al.*,

Petitioners,

v.

DESERT PALACE, INC., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Nevada law prohibits any civil cause of action to recover a gaming debt not evidenced by a credit instrument, and in its stead provides an administrative remedy followed by state court judicial review. The question presented here is whether application of this state law by a federal court exercising diversity jurisdiction, to hold that a claim for an unpaid slot machine jackpot based on an allegation of fraud and cheating fails to state a claim upon which relief can be granted, (a) involves anything more than a pure determination of state law, to which this Court has a practice of deferring, (b) conflicts with the settled law of this Court or the federal courts of appeals, or (c) deprives the claimant of any right under federal law?

STATEMENT UNDER RULE 29.1

Pursuant to Rule 29.1, respondents Desert Palace, Inc. and Caesars Palace Corp., a Delaware corporation (together "Caesars"), state as follows: Desert Palace, Inc. is the wholly owned subsidiary of Caesars Palace Corp., which in turn is the wholly owned subsidiary of Caesars World, Inc. Respondents Desert Palace, Inc. and Caesars Palace Corp. do not have any subsidiaries that are not wholly owned. There is no such entity as Caesars Palace, a Nevada corporation, which also is named as a respondent.

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STATUTES INVOLVED

Section 463.361 of the Nevada Revised Statutes provides:

> **463.361 Enforceability of gaming debts.**
>
> 1. Except as provided in NRS 463.361 to 463.366, inclusive, gaming debts not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action.
>
> 2. A claim by a patron of a licensee for payment of a gaming debt not evidenced by a credit instrument may be resolved by the [state gaming control] board in accordance with NRS 463.362 to 463.366, inclusive.

Sections 463.362 through 463.3668 of the Nevada Revised Statutes provide an administrative remedy for claims of unpaid gambling winnings and permit state court judicial review of such claims. These sections are set forth in their entirety in the appendix to the petition for writ of certiorari, at pages G1-G10.[1]

STATEMENT OF THE CASE

Overview

This case involves a claim by petitioners Russell, Beth and Kirk Erickson ("the Ericksons") to a gaming debt not evidenced by a credit instrument—an

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[1] All references to the petition for writ of certiorari in this case will be abbreviated "Petition" followed by the page(s) cited; all references to the appendix to the Petition will be abbreviated "Pet. App." followed by the page(s) cited.

unpaid slot machine jackpot. By statute, such claims are void and unenforceable and cannot be pursued in Nevada's courts. *See* NRS 463.361, *reprinted supra* at 1. Instead, Nevada law provides an administrative remedy followed by state court judicial review. *See* NRS 463.361 through 463.3668; Pet. App., G1-G10.

As described in more detail below, the Ericksons thoroughly pursued their claim to the jackpot administratively and in state court on judicial review, and lost. Concurrently, they pursued an action in federal court for the jackpot, plus consequential and punitive damages, asserting, among other things, what they describe as a common law claim of fraud and cheating. The federal district court, exercising diversity jurisdiction, held that the Ericksons' asserted common law claim was subsumed in and barred by the Nevada statutes cited above, and that the Ericksons were limited to the administrative/judicial review remedy provided in those statutes. The court of appeals affirmed.

The Ericksons now ask this Court to review the decisions of the federal district court and the court of appeals.

The Jackpot

Respondent Desert Palace, Inc. operates Caesars Palace, a licensed casino in Las Vegas, Nevada. On August 5, 1987, while playing a slot machine in Caesars Palace, Kirk Erickson aligned a jackpot worth $1,061,812. At the time, Kirk was just 19 years old. Under Nevada law, it is unlawful for any person under 21 years of age to play a slot machine. *See* NRS 463.350.

Soon after the jackpot was aligned, agents of the State Gaming Control Board ("Board") came to Caesars Palace to investigate. The agents were called after executives of Caesars Palace had reviewed a videotape and discovered that the person claiming the jackpot, Russell Erickson (Kirk's father), was not the person who had played the slot machine.

In response to questioning by the agents, Russell Erickson insisted he was the one who had aligned the jackpot. Only after the agents told Russell about the videotape and advised him it was a felony under Nevada law to claim the jackpot of another, *see* NRS 465.070(3) and 465.088(1), did Russell admit it was Kirk who had played the slot machine.

The agents explained to Russell that he could not claim the jackpot because it would be a felony under Nevada law, and that Kirk could not claim the jackpot because he was underage.

The Proceedings Under State Law

On August 7, 1987, the Ericksons filed a formal claim to the jackpot with the Board under NRS 463.362(1). On August 27, 1987, pursuant to NRS 463.362(2), one of the agents who had investigated the jackpot issued a written decision denying the Ericksons' claim.

On September 15, 1987, pursuant to NRS 463.363(1), the Ericksons petitioned the Board for a hearing to reconsider the agent's decision. The Ericksons claimed they were entitled to the jackpot under theories of breach of contract, unjust enrichment and fraud.

On August 23 and 24, 1988, following extensive briefing and 11 months of discovery, a full evidentiary hearing pursuant to NRS 463.363(6) and (7) was conducted before the Board's hearing examiner. On November 9, 1988, pursuant to NRS 463.364(2), the Board issued an 18-page Decision and Order sustaining the decision of its agent. *See* Pet. App., B1-B16.

The principal ground for the Decision and Order was that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson. Pet. App., B4-B8. As alternative bases for the Decision and Order, the Board also analyzed and rejected the Ericksons' theories of breach of contract, unjust enrichment and fraud. *Id.*, B8-B15. In doing so, the Board repeatedly found there was no evidence in the record to show that Caesars Palace knew or had reason to believe Kirk Erickson was under 21 years of age, or made any false representation to Kirk or his parents regarding the legal age for gambling in Nevada. *Id.*

> For example, Caesars did not acknowledge to Kirk that he was underage and then assure him that he could gamble with impunity, and that Caesars would not set up his age as a defense to Kirk's claim. Caesars could not even be said to have made these representations by implication, because, as noted above, Caesars had no reason to know that Kirk was underage, due to Kirk's mature appearance.

Id., B12.

The Board also found that the Ericksons engaged in "deceptive behavior" after Kirk aligned the jackpot, from which it could infer that Kirk and his par-

ents knew Kirk was gambling illegally. Pet.App., B11 n.1. Finally, the Board concluded that Kirk's parents, Russell and Beth Erickson, lacked standing to claim the jackpot. *Id.*, B15.

The Ericksons timely petitioned the state district court for judicial review pursuant to NRS 463.3662. On July 3, 1989, following briefing and oral argument, the court entered an order pursuant to NRS 463.3666, affirming the Decision and Order of the Board. *See* Pet. App., D1-D3. In a decision that had been rendered from the bench at the close of oral argument six days earlier, the court agreed that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson.[2] The court also observed:

> Concerning the question of what actually occurred on the premises at the time of the winning of the jackpot, I would concede, as I think probably the hearings [sic] examiner would concede, that a casino knowingly allowing a minor to gamble and lose, and then disallowing the collection of any winnings the minor would have, would be fraudulent and would be reprehensible. In this matter, there is no evidence of that.

Addendum, 2a.

Pursuant to NRS 463.3668, the Ericksons timely petitioned the Nevada Supreme Court for judicial review. On May 21, 1990, the Nevada Supreme Court entered an order dismissing the petition. *See* Pet. App., E1-E3. The Nevada Supreme Court agreed with

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[2] A transcript of the state district court judge's remarks from the bench is included in the addendum to this brief.

the Board and the district court that NRS 463.350 prohibited payment of the jackpot to Kirk Erickson. Pet. App., E1-E2. It also agreed there was no "evidence showing that [Caesars] knowingly allowed Kirk Erickson to gamble while underage." *Id.*, E2.

The Federal Action

On August 11, 1988, less than two weeks before the Board hearing, the Ericksons filed a complaint in the United States District Court for the District of Nevada against Caesars, the Board, the two agents who had investigated the jackpot, and the State of Nevada (the defendants other than Caesars will be referred to collectively as "the State defendants").

In the complaint, the Ericksons alleged jurisdiction based on diversity of citizenship and asserted five claims for relief. The first four claims were for payment of the jackpot based on theories of breach of contract, quasi-contract, fraud and cheating, and interference with contract, respectively. The fifth claim for relief sought a declaratory judgment finding NRS 463.350 unconstitutional as implemented and enforced.[3]

By order entered March 9, 1989, the federal district court granted the motions of Caesars and the State defendants to dismiss the complaint. *See* Pet. App., C1-C4. Citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the court determined that, since diversity jurisdiction was asserted, Nevada's substantive law controlled. Pet. App., C2. Then, relying on subsection 1 of NRS 463.361, which bars "any . . .

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[3] The Ericksons' complaint also is included in the addendum to this brief.

civil cause of action" to recover a gaming debt not evidenced by a credit instrument, the court held that the first four claims for relief failed to state a claim upon which relief could be granted. Pet. App., C2.

The district court stated: "[P]laintiffs cannot maintain a civil action to recover a jackpot, but instead are limited to an administrative proceeding followed by judicial review as provided in NRS Sections 463.361 to 463.3668." Pet. App., C2.

The district court also held that because the Ericksons had not yet exhausted the remedies provided in the Nevada statutes, it lacked subject matter jurisdiction over their first four claims for relief. Pet. App., C2-C3. Finally, the district court held that it lacked subject matter jurisdiction over the Ericksons' fifth claim, seeking declaratory relief, because the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, did not provide an independent basis for jurisdiction in federal court. Pet. App., C3.

By order entered July 5, 1989, the district court denied the Ericksons' motion for reconsideration. *See* Pet. App., C5-C7. The court rejected the Ericksons' argument that their claim for payment of the jackpot was not an attempt to recover a gaming debt not evidenced by a credit instrument, which would be barred by Nevada law, but instead was a common law action for fraud and cheating that fell outside the bar imposed by NRS 463.361. Pet. App., C6.

The Ericksons appealed only the dismissal of their third claim for relief, alleging fraud and cheating against Caesars, to the United States Court of

Appeals for the Ninth Circuit.[4] The Ericksons argued the claim was not barred by NRS 463.361, but instead fit within an exception for fraud claims that had been judicially created in *Berman v. Riverside Casino Corp.*, 323 F.2d 977 (9th Cir. 1963), and *Zaika v. Del E. Webb Corp.*, 508 F. Supp. 1005 (D. Nev. 1981).

In opposition, Caesars argued first that the appeal was moot, because even if the Ericksons' claim of fraud and cheating stated a claim upon which relief could be granted and were remanded to the district court, it would be precluded by application of the doctrines of *res judicata* and collateral estoppel. Those doctrines would apply, Caesars argued, because the Decision and Order of the Board, made after a full and fair hearing and affirmed by the state district court and the Nevada Supreme Court, expressly rejected the Ericksons' claim to the jackpot based on a theory of fraud, and found that Caesars Palace did not make any false representations to Kirk Erickson.

Caesars also argued that, in any event, the federal district court was correct in holding that the claim was barred by NRS 463.361, and that *Berman* and *Zaika*, which had been decided before the enactment of the statute, were inapplicable.

In an opinion filed August 21, 1991, the court of appeals affirmed the federal district court's dismissal of the Ericksons' claim. *See Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991). Reviewing the district court's decision *de novo*, the court of appeals

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[4] Because the Ericksons did not appeal the dismissal of their claims against the State defendants, the State defendants should not have been appellees before the court of appeals and should not be respondents here.

initially determined that dismissal of the claim for lack of subject matter jurisdiction no longer was valid because the Ericksons had exhausted the remedies provided by Nevada law. *Id.* at 696. The court of appeals held, however, that the district court was correct in concluding the claim was barred by application of NRS 463.361. The court of appeals stated:

> Appellants assert the Nevada statute should not bar this action because it does not involve a "gaming debt." We agree with the district court that "Nevada characteristically categorizes suits to collect unpaid gambling winnings as gaming debts." *Harrah's Club v. State Gaming Control Bd.*, 104 Nev. 762, 766 P.2d 900 (1988); *State Gaming Control Bd. v. Breen*, 99 Nev. 320, 323, 661 P.2d 1309, 1311 (1983); *Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 565 (1971). The district court correctly held that NRS 463.361 to 463.3668 limits a plaintiff's recovery of a gaming debt to the exclusive administrative/judicial review procedure contained therein.

Erickson, 942 F.2d at 696.

The court of appeals also held that *Berman* and *Zaika* were inapplicable. It continued:

> We do not believe the Nevada legislature intended to allow parties to avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings. Under NRS 463.361, parties who assert they are owed a gaming debt, *fraud or no fraud*, are confined to the

> administrative process followed by state judicial review.
>
> Because NRS 463.361 precludes Appellants' fraud action, they have failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). We therefore affirm the decision of the district court.

Erickson, 942 F.2d at 697 (emphasis added). The court of appeals did not reach Caesars' argument respecting the potential *res judicata* and collateral estoppel effects of the state proceedings.

By order entered September 27, 1991, the court of appeals denied the Ericksons' petition for rehearing. *See* Pet. App., F1.

REASONS FOR DENYING WRIT OF CERTIORARI

The Application of Substantive State Law by a Federal Court Exercising Diversity Jurisdiction, to Hold that a Common Law Claim of Fraud and Cheating Fails to State a Claim upon which Relief Can Be Granted, Is Purely a Determination of State Law, to which this Court Has a Practice of Deferring, Is Consistent with the Settled Law of this Court and the Courts of Appeals, and Does Not Deprive the Claimant of any Right under Federal Law.

Plainly and simply, the federal district court and the court of appeals applied substantive Nevada law to the Ericksons' common law claim of fraud and cheating and determined that the claim was barred.[5]

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[5] The court of appeals did *not,* as the Ericksons contend, find that the district court lacked subject matter jurisdiction over the claim; nor did it decide that the claim was precluded by the decisions rendered in the state proceedings. *Compare* Petition, 7-8, 9-10, 12-19, with *Erickson v. Desert Palace, Inc.*, 942 F.2d

The lower courts' determinations of state law were correct, as the authorities they cited reveal. More to the point, this Court has a "practice of deference" to the determinations of state law questions by the district courts and courts of appeals, *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); consequently, there is nothing in the decisions below that merits review.[6] *See also Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988) (this Court has a "settled and firm policy of deferring to

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694 (9th Cir. 1991). Therefore, the Ericksons' arguments pertaining to these two non-issues are not addressed in any detail in this brief. However, the argument made by Caesars to the court of appeals on the question of preclusion does apply with equal force here. That is, even if this Court were to decide that the Ericksons could maintain a civil action for fraud and cheating notwithstanding NRS 463.361, the action would in all likelihood be barred on remand by the findings and conclusion of the Board and the state courts under theories of *res judicata* and collateral estoppel.

In addition to their mischaracterization of the court of appeals' decision, the Ericksons also make numerous factual misrepresentations in the Petition. As the Ericksons themselves acknowledge at page 23 of the Petition, the factual record in this matter consists solely of the allegations in the complaint. As to those allegations, the Board, state district court and Nevada Supreme Court all found them meritless.

Finally, the Ericksons also mischaracterize what transpired in the proceedings before the Board, particularly the hearing examiner's decision concerning the witnesses the Ericksons intended to present. If required, Caesars would show that the Ericksons received a full and fair hearing before the Board and were permitted to call whatever witnesses they pleased.

[6] The Ericksons almost concede as much. They state: "Caesars Palace's alternative [sic] grounds for upholding dismissal of this federal lawsuit would normally not be worthy of consideration by this Court, since it revolves solely around an issue of state law." Petition, 26.

regional courts of appeals in matters that involve the construction of state law"). For this reason, alone, the Petition should be denied.

In any event, there is no offense to federal law or constitutional mandate when a federal court, sitting in diversity, applies substantive state law to bar a state common law claim. On the contrary, the analyses performed and the conclusions reached by the district court and court of appeals in this case are consistent with the settled law of this Court, as well as the courts of appeals.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), this Court held that a federal district court sitting in New York and having diversity jurisdiction over the plaintiff's class action for breach of trust was bound to apply New York's statute of limitations even though it would result in dismissal of the action. This Court stated:

> [S]ince a federal court adjudicating a state-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.
>
> . . .
>
> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. . . .

> [I]f a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery.

Id. at 108-09, 110.

The rule originally stated in *York* was applied by this Court again in *Angel v. Bullington*, 330 U.S. 183 (1947), *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

In *Angel*, this Court held that a federal district court sitting in North Carolina and having diversity jurisdiction could not entertain an action for a deficiency judgment arising out of a Virginia mortgage where a North Carolina statute precluded suits for deficiency judgments.

Similarly, in *Woods*, this Court held that a Tennessee corporate plaintiff could not sue a Mississippi defendant on a Mississippi cause of action in a Mississippi federal court when Mississippi would not allow the corporation to sue in its courts because of the corporation's failure to register as a foreign corporation doing business there. This Court stated:

> Angel v. Bullington in its alternative ground followed the view of Guaranty Trust Co. of New York v. York, . . . that for purposes of diversity jurisdiction a federal court is "in effect, only another court of the State. * * *." . . . The York case was premised on the theory that a right which local law creates but does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that *where in such cases one is barred from re-*

> *covery in a state court, he should likewise be barred in the federal court.*

Woods, 337 U.S. at 538 (emphasis added; citation omitted); *see also* C. Wright, *The Law of Federal Courts* § 46 (4th ed. 1983) ("[i]f a state closes its doors to a particular class of litigant or claim, a federal court, exercising diversity jurisdiction, cannot entertain a suit by such a litigant or on such a claim").

And in *Ragan*, this Court held that a Kansas statute, which did not toll the applicable statute of limitations until the summons and complaint were served, applied to defeat a diversity action for personal injuries brought in a Kansas federal court where the summons and complaint were not served until after the statute of limitations had run, even though Rule 3 of the Federal Rules of Civil Procedure would have tolled the statute upon the filing of the complaint. This Court stated: "We cannot give [a cause of action] longer life in the federal court than it would have had in the state court without adding something to [it]. We may not do that consistently with Erie R. Co. v. Tompkins." *Ragan*, 337 U.S. at 533-34.

As this Court has observed, Congress, in providing the statutory basis for diversity jurisdiction, "afforded out-of-State litigants another tribunal, not another body of law." *York*, 326 U.S. at 112.[7]

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[7] What became known as the "outcome determinative" test of *York* was modified by this Court in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and *Hanna v. Plummer*, 380 U.S. 460 (1965). Even as modified by these decisions, however, the basic rule established in *York* and followed in *Angel*, *Woods* and *Ragan* is controlling here.

The federal courts of appeals have consistently followed the pronouncements of this Court in *York*, *Angel*, *Woods* and *Ragan*. *Cf. Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (state law applied to cap damages in medical malpractice action tried to federal district court sitting in diversity); *In re Asbestos Litig.*, 829 F.2d 1233 (3d Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (state law applied to prohibit assertion of "state-of-the-art" defense in products liability action brought in federal court sitting in diversity); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362 (6th Cir. 1984) (state statute of repose applied to bar action for construction defects brought in federal court sitting in diversity); *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407 (7th Cir. 1984) (state worker's compensation act, which vested exclusive jurisdiction over workers' claims for job-related injuries in state industrial board, applied to bar worker's action for job-related injury brought against employer in federal court sitting in diversity); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982) (same); *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981) (state guest passenger rule applied to bar wrongful death action brought in federal court sitting in diversity).

The application of Nevada law on gaming debts to bar the Ericksons' common law claim of fraud and cheating is consistent with these precedents. Just as importantly, and contrary to the principal argument in the Petition, it does not deprive the Ericksons of any right under federal law. Specifically, it does not deprive them of any right to a jury trial or punitive damages.

Whether a party has a right to a jury trial in federal court is a matter of federal law. *Simler v. Conner*, 372 U.S. 221, 222 (1963). In *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917), this Court held that the Seventh Amendment right to trial by jury in a civil action is not violated where a state abolishes a right of action, leaving nothing for trial by jury. *Id.* at 235. "In other words, if the cause of action is completely done away with, then the right to trial by jury becomes completely irrelevant. Since the right attaches to civil trials, there can be no right—and no constitutional violation—if no civil trial is available." *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 651, 771 P.2d 711, 719 (1989).

Whether a party has a right to recover punitive damages in a federal court sitting in diversity is a matter of state law. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). Under Nevada law, "[a] plaintiff is *never* entitled to punitive damages as a matter of right." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 451, 514 P.2d 1180, 1182 (1973) (emphasis added); *see also Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 829 (1962) ("[c]ompensatory damages must be awarded before a recovery of punitive damages is authorized").

Thus, because the Ericksons are barred by Nevada law from pursuing their claim of fraud and cheating, they have no corresponding right to a jury trial or punitive damages.

Finally, this Court has held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v.*

Silver, 280 U.S. 117, 122 (1929); *see Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *see also Martinez v. California*, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational").

In this case, NRS 463.361, which was relied upon by the federal district court and the court of appeals, merely codified part of the longstanding common law rule in Nevada that all gaming debts are void and unenforceable. *Compare* 1983 STATUTES OF NEVADA, Ch. 582 (codified as NRS 463.361 through 463.366), *with Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 656 (1971), *Weisbrod v. Fremont Hotel, Inc.*, 74 Nev. 227, 326 P.2d 1104 (1958), and *Scott v. Courtney*, 7 Nev. 419 (1872). However, to the extent the statute could be perceived to have "abolished" the Ericksons' common law cause of action for fraud and cheating, and substituted an administrative remedy followed by state court judicial review in its place, such legislation is constitutionally permissible. *Silver v. Silver*, *supra*; *see also New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (upholding constitutionality of New York's worker's compensation scheme which, in lieu of common law liability to injured employee for act of negligence, imposed administratively regulated remedy of employer liability without regard to negligence based on the employee's loss of earning power).

CONCLUSION

The application of substantive state law to bar the Ericksons' claim of fraud and cheating is consistent

with the settled law of this Court, as well as the decisions of the courts of appeals, and does not deprive the Ericksons of any right under federal law or raise any other federal issue.

The Ericksons' true disagreement is with the determination by the district court and the court of appeals that NRS 463.361 applied to their claim of fraud and cheating in the first instance. *See* Petition, 20-26. However, this Court has a "practice of deference" to the determinations of state law questions by the district courts and courts of appeals. Just as importantly, the determinations of state law by the lower courts in this case were correct, which obviates any possible need for review. Accordingly, the Ericksons' petition for a writ of certiorari should be denied.

Respectfully submitted,

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DISTRICT COURT

CLARK COUNTY NEVADA

Case No. A270429
Department Fourteen

RUSSELL ERICKSON, et al,

Plaintiffs,

vs.

CAESARS PALACE,

Defendant.

REPORTER'S TRANSCRIPT
OF
EVIDENTIARY HEARING

BEFORE THE HONORABLE DONALD M. MOSLEY,
DISTRICT JUDGE

Tuesday, June 27, 1989

APPEARANCES:

For the Petitioners: James P. Sitter, Esquire

For the Respondents: Robert D. Faiss, Esquire
Marc H. Rubinstein, Esquire

For the Gaming Control Board: Gloria Stendardi, Esquire

Reported by: Sharon J. Thielman, CSR No. 72

* * *

[P. 47] THE COURT: Thank you, Mr. Sitter. Thank you very much. Concerning the statute in question, 463.350,

Mr. Sitter points to subsection 1(a) where it is stated that, and I am paraphrasing, "A minor shall not be allowed to play." That does not say collect gaming proceeds. To my mind, the word play as used in that provision of the statute implies both winning and losing and that is the essence of play in that context.

Moving to (b) of that same subsection, Mr. Sitter asks why there should be a distinction in (b) where it says in fact that a person shall not be allowed—a minor should not be allowed to collect winning wagers and that provision actually specifically prohibits the collecting of winning wagers and the argument is why is it not specifically prohibited collecting proceeds from play in the sentence above it.

I think one very logical explanation for that distinction is that wagers must be collected, affirmative act, whereby slot machine winnings are paid automatically in many instances and in fact most instances so I think that could be an explanation and that is my view of the pertinent part of those two provisions.

I would point out that the fact that a statute has been changed does not necessarily mean that it was invalid in its original version. And in my view the statute as it [P. 48] originally appeared was not invalid.

Concerning the question of what actually occurred on the premises at the time of the winning of the jackpot, I would concede, as I think probably the hearings [sic] examiner would concede, that a casino knowingly allowing a minor to gamble and lose, and then disallowing the collection of any winnings that the minor would have, would be fraudulent and would be reprehensible. In this matter, there is no evidence of that.

There is scant indication, if it can be construed as that, that the casino knew or should have known that Mr. Erickson was a minor. I am referring to the keno situation. The evidence in part that I have looked at and reviewed

and heard argued here was that Kirk and his father were in the casino for some time over a period of two days; that the father in fact ultimately tried to collect the jackpot for his son; that there were signs in the area suggesting and very plainly pointing out the fact that people under the age of 21 years should not gamble and that the evidence of Mr. Erickson's appearance was heard by the hearings officer. This is just part of that which is in the transcript.

There has been some mention of public policy in argument here. And the question that comes, I think, should a person be allowed to profit from their unlawful acts and there is no question that a minor gambling is a misdemeanor in this [P. 49] jurisdiction. And I think also the question of whether an individual should be able to profit or utilize as a defense lack of knowledge of a particular law prohibiting such, in this case prohibiting gambling underage I don't know that the hearings examiner contemplated those particular issues but I think they have been argued here inferentially at least.

In my view, sufficient evidence is present to cause to have confirmed the decision of the hearings examiner and I so confirm. Is there anything further, gentlemen, ladies? Court is adjourned.

* * * * *

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CASE NO: CV-S-88-660-LDG LRL

RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON,

Plaintiffs,

vs.

DESERT PALACE, INC.; CAESARS PALACE, a Nevada corporation; CAESARS PALACE CORPORATION, a Delaware corporation; DONALD ABRAHAMSON; MARIAN VINCE, formerly known as MARIAN FOURNO; STATE OF NEVADA; and NEVADA GAMING CONTROL BOARD,

Defendants.

COMPLAINT

JURY TRIAL DEMANDED

JURISDICTION

1. This is an action based upon diversity of citizenship and the court has jurisdiction pursuant to 28 U.S.C. Section 1332.

2. Plaintiffs RUSSELL ERICKSON, BETH ERICKSON, and KIRK ERICKSON are citizens of the State of Arkansas. Defendant DESERT PALACE, INC., is a Nevada corporation. Defendant CAESARS PALACE is a Nevada corporation. Defendant CAESARS PALACE CORPORATION is a Delaware corporation duly licensed to conduct business in the State of Nevada. Defendants [sic] STATE OF NEVADA, by and through its agency, the NEVADA GAMING CONTROL BOARD, regulates gaming in Nevada. Defendants DONALD ABRAHAMSON and MARIAN VINCE, formerly known as MARIAN FOURNO, are agents of the said NEVADA GAMING CONTROL BOARD and are citizens of the State of Nevada. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

FIRST CLAIM FOR RELIEF

(BREACH OF CONTRACT)

3. In doing or omitting to do each of the acts or omissions alleged herein, each Defendant was the agent, servant and employee of each other Defendant and was acting within the scope of his, her or its agency and employment.

4. At all times relevant hereto, Defendants DESERT PALACE, INC., CAESARS PALACE, and CAESARS PALACE CORPORATION, referred to collectively hereafter as "CAESARS PALACE," owned, managed and/or were responsible in some manner for the operation of the hotel and casino more commonly known as CAESARS PALACE, which is located at 3570 South Las Vegas Boulevard, Las Vegas, Clark County, Nevada.

5. At all times relevant hereto, Defendants DONALD ABRAHAMSON and MARIAN VINCE were employed by the State of Nevada as Gaming Control Agents, and purported to act in the course and scope of said employment.

6. Plaintiffs RUSSELL ERICKSON and BETH ERICKSON are and were at the time of the incident complained

of herein husband and wife. Plaintiff KIRK ERICKSON is their son and, at the time of the incident complained of herein, was approximately 19 years of age. During the summer of 1987, Plaintiffs decided to spend part of their annual vacation in Las Vegas, Nevada, and while there to gamble in the casinos of Nevada. They agreed that Plaintiff RUSSELL ERICKSON would provide the necessary funds for gambling, and that if there were any winnings, all such winnings would be placed in a pool and divided equally between [sic] them.

7. At the time of entering into the aforesaid agreement, and at all times until the incident complained of herein, based upon their knowledge of gambling laws in their home state of Arkansas as well as other states, and the failure of Defendants to indicate a contrary gambling age in Nevada, Plaintiffs believed that the legal gambling age in the State of Nevada was 18 years.

8. On or about August 5, 1987, Plaintiffs, together with Jennifer Erickson and Brandee M. Head, both 15 years of age, arrived in Las Vegas and checked into the hotel at Caesars Palace. After sleeping, RUSSELL ERICKSON and BETH ERICKSON went down to the swimming pool of the hotel and casino, where they were subsequently joined by KIRK ERICKSON. While at the swimming pool, the Plaintiffs, including KIRK ERICKSON, played several games of Keno. Subsequently, KIRK ERICKSON went into the casino and began to play the slot machines. He was joined later by his parents.

9. Using the appropriate coins and tokens which KIRK ERICKSON repeatedly purchased from personnel of Defendant CAESARS PALACE, KIRK ERICKSON played the slot machines for approximately 45 minutes to an hour. He placed the coins or tokens into the machine and when a winning combination appeared on the machine, he was paid the sum that he had won directly by the machine. Finally, while playing a bank of slot machines known as

"Million Dollar Baby", Plaintiff hit a jackpot which, according to the instructions on the machine, would be paid by an attendant. When an attendant failed to respond to his call for assistance, KIRK ERICKSON called his father to watch the machine while he went to find an attendant. While he was gone, an attendant appeared and told RUSSELL ERICKSON that he was a big winner, that he had won $1,061,812.00. Upon hearing this, and feeling satisfied that his father was taking care of the situation for him, KIRK ERICKSON left the area to telephone his relatives and advise them of his good fortune.

10. Ultimately, Defendant CAESARS PALACE refused to pay, and continues to refuse to pay, the subject winning jackpot to the Plaintiffs, or any of them, claiming as the basis therefor that KIRK ERICKSON was under age.

11. The Defendant CAESARS PALACE knew or should have known that Plaintiff KIRK ERICKSON was under the legal gambling age in the State of Nevada, but at no time prior to KIRK ERICKSON gambling at the Casino did any representative thereof advise him or any member of the Plaintiffs' party, by any means whatsoever, of the legal gambling age in Nevada or that he was not of legal gambling age in the State of Nevada, nor did they ask for any identification from him showing his age, object to his gambling or attempt to stop the same; rather, Plaintiff KIRK ERICKSON was repeatedly offered alcoholic beverages and implicitly was encouraged and provided the opportunity to gamble.

12. Defendant CAESARS PALACE entered into a contract with Plaintiff KIRK ERICKSON at the time of selling him the tokens that were legal only for the purpose of gambling in the establishment of Defendant CAESARS PALACE and if he used said tokens in a game or slot machine and obtained a winning result therefrom, Defendant CAESARS PALACE would pay the sum won by Plaintiff KIRK ERICKSON; when Defendant CAE-

SARS PALACE permitted Plaintiff KIRK ERICKSON to play the slot machines without objection thereto, it confirmed the terms of the aforesaid contract; by refusing to pay the winnings after just demand was made therefor by Plaintiffs, Defendant CAESARS PALACE did breach their [sic] contract with the Plaintiffs.

13. By reason of the aforesaid breach of contract, Plaintiffs seek an award for their losses in the amount of $1,061,812.00 and interest at the maximum legal rate accruing from the date of breach, plus other consequential damages, the amounts of which are yet to be determined.

14. It has been necessary for Plaintiffs to retain counsel to bring this action and they are entitled to an award of attorneys' fees in addition to the other relief sought herein.

SECOND CLAIM FOR RELIEF

(QUASI-CONTRACT)

15. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 14 as though fully set forth herein.

16. That prior to "hitting" the aforesaid jackpot, Plaintiff KIRK ERICKSON had deposited a substantial sum of money in the slot machines of Defendant CAESARS PALACE, relying upon the pay-out displays shown on the machines to the extent that if the pull of the handle produced a losing combination, he expected to lose the money he deposited and, if a winning combination was produced, he expected to be paid according to the display for the particular combination.

17. Upon being advised that they had won the large jackpot, Plaintiff RUSSELL ERICKSON gave several large tips to members of the staff of the Defendant CAESARS PALACE and Plaintiff KIRK ERICKSON made long distance calls to friends and/or relatives to tell them of his good fortune; Plaintiffs would not have so acted but for

the representations to them by members of the staff of CAESARS PALACE that they had won the large jackpot.

18. That the slot machines in CAESARS PALACE are set to pay a jackpot only after a substantial amount of money has been deposited into the bank of slot machines; that Defendant CAESARS PALACE advertises and represents to its patrons that they retain only a small amount of the money deposited in said slot machines; that Defendant CAESARS PALACE makes no effort to inform its patrons of the legal gambling age or to prohibit gambling by those who are under age; that Defendant CAESARS PALACE profits more from allowing an underage person to gamble as from a gambler of legal age; and that to allow Defendant CAESARS PALACE to retain the proceeds of the jackpot, plus any other monies deposited in said slot machine by Plaintiffs, would unjustly enrich said Defendant and reward it for its neglect or failure to enforce the gaming laws of the State of Nevada.

19. By reason of the aforesaid detrimental reliance by Plaintiffs upon the displays shown on the slot machines and upon the conduct and express representations of agents of Defendant CAESARS PALACE, and/or the unjust enrichment of said Defendant by its refusal to pay the jackpot, Plaintiffs seek an award of compensatory damages in the amount of $1,061,812.00, plus interest and consequential damages in an amount as yet to be determined.

THIRD CLAIM FOR RELIEF

(FRAUD AND CHEATING)

20. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 19 as though fully set forth herein.

21. Gambling by those under the lawful age in a casino operated by Defendant CAESARS PALACE is commonplace.

22. As a matter of policy, Defendant CAESARS PALACE does not adequately nor competently advise its patrons of the lawful gambling age, nor enforce the Nevada law restricting gambling by those who are under age.

23. By reason of its knowing and willful failure to disclose the lawful age for gambling and to regard and enforce the terms thereof, Defendant CAESARS PALACE encourages gambling in its casino by minors, and profits therefrom through all the fraudulent acts alleged above. In conjunction with "bad faith" reliance upon the alleged orders of gaming control agents not to pay major jackpots to minors, Defendant CAESARS PALACE is unconscionally [sic] allowed to increase its profit margin illegally under normal gaming rules.

24. That by allowing Plaintiff KIRK ERICKSON to purchase gaming tokens for use in the slot machines and allowing him to play the slot machines, both without objection, Defendant CAESARS PALACE did represent to Plaintiff KIRK ERICKSON that he had the same opportunity as anyone else to win a jackpot; that CAESARS PALACE did not intend to pay a jackpot if it were won by a minor; that said misrepresentation was knowingly and willfully made for the purpose of defrauding and cheating Plaintiffs and other underage gamblers.

25. Plaintiffs, and KIRK ERICKSON specifically, relied to their detriment with respect to Defendant's representations as to jackpot payoffs. Had Plaintiffs known the true facts with regard to Defendant's false representations, the subject incident would not have occurred.

26. For such knowing and intentional fraud and cheating, Plaintiffs seek an award of compensatory damages in the amount of $1,061,812.00, consequential damages in an amount yet to be determined, and exemplary damages in the amount of $20,000.00.

FOURTH CLAIM FOR RELIEF

(INTERFERENCE WITH CONTRACT)

27. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 26 as though fully set forth herein.

28. That Defendants STATE OF NEVADA, its agency NEVADA GAMING CONTROL BOARD, by and through their agents DONALD ABRAHAMSON and MARIAN VINCE, while purportedly acting in their role as Gaming Control Agents for the State of Nevada, did exceed the scope of their lawful authority and by means of threats, harassment and intimidation did endeavor, coerce and compel Plaintiffs to withdraw their lawful claim for their jackpot winnings.

29. That said Defendants ABRAHAMSON and FOURNO have not and did not at any time attempt to enforce the lawful age limitation of those persons gambling at the CAESARS PALACE CASINO, except in an arbitrary and capricious effort to deny Plaintiffs the proceeds of their jackpot.

30. That the aforesaid acts and omissions of Defendants ABRAHAMSON and FOURNO were done negligently, intentionally, knowingly, willfully and oppressively, and with reckless disregard of the Plaintiffs' rights. That by reason of the aforesaid, Defendants ABRAHAMSON and FOURNO interfered unlawfully with the contractual relationship between Plaintiffs and Defendant CAESARS PALACE concerning payment of the winning jackpot.

31. By reason of the aforesaid acts and omissions of Defendants ABRAHAMSON and FOURNO, Plaintiffs seek an award against them, and each of them, of compensatory damages in the amount of $1,061,812.00 plus consequential damages in an amount as yet to be determined.

FIFTH CLAIM FOR RELIEF

(DECLARATORY JUDGMENT)

32. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1 through 31 as though fully set forth herein.

33. Notwithstanding valid jurisdiction alleged in Paragraph 1, Plaintiffs are entitled to declaratory and further relief pursuant to 28 U.S.C. Sections 2201 and 2202, and are desireous [sic] of subjecting the statute and its enforcement procedures to close scrutiny.

34. The statute in question, Nevada Revised Statute 463.350, states in pertinent part:

> "1. A person under the age of 21 years shall not:
>
> (a) Play, or be allowed to play, any licenced [sic] game or slot machine.
>
> ***
>
> 2. Any licensee, employee, dealer or other person who violates or permits the violation of any of the provisions of this section and any person, under 21 years of age, who violates any of the provisions of this section is guilty of a misdemeanor.
>
> 3. And for any prosecution or other proceeding for the violation of any of the provisions of this section, it is no excuse for the licensee, employee, dealer or other person to plead that he believed the person to be 21 years old or over."

35. The above statute is criminal in nature and offers no further guidance relative to further sanctions in the event that a minor is allowed to gamble and subsequently wins.

36. The Nevada State Gaming Regulations offer no further guidance concerning what actions are to be taken relative to money lost by minors, or jackpots won by minors.

37. Plaintiffs contend that the STATE OF NEVADA, by and through its regulatory agency, the GAMING CONTROL BOARD, and its agents, arbitrarily and capriciously interpret the said statute to provide further sanctions, which only work to the benefit of the licensee, and to the detriment of any unfortunate minor who happens to play.

38. The fact situation in this case is a perfect example of said arbitrary and capricious application of the statute concerning the gambling by minors since it is apparent to Plaintiffs that the only time said statute is enforced is in the event that a minor wins.

39. To Plaintiffs' knowledge and belief, no citations were issued nor fines levied by the GAMING CONTROL BOARD against CAESARS PALACE for this statutory violation.

40. In addition to the arbitrary and capricious enforcement policies by the GAMING CONTROL BOARD in its application of the subject statute, said Board, despite any specific guidelines in its regulations, is certainly overreaching the stated bounds of said statute in its alleged Order to CAESARS PALACE directing said licensee NOT to pay the subject jackpot.

41. In essence, it appears to be the policy of the State Gaming Control Agency to protect the casinos, and the casinos only, in derogation of the true intent of the Gaming Control Statutes in general, and certainly to the detriment of the very party for whose benefit the statute was enacted, the public in general and, in this case, minors.

42. That, although there are so-called "administrative remedies" available, Plaintiffs are reluctant to have this matter heard before a hearing officer of the very agency which is arbitrarily, capriciously, and in an over-reaching

fashion, interpreting and allegedly enforcing NRS 463.350. Further, neither the statute nor the gaming regulations themselves provide any guidance for said hearing officer, thus subjecting Plaintiffs to further potential for arbitrary and capricious interpretation of the statute.

43. It is Plaintiffs' further contention that both Defendants CAESARS PALACE and the STATE OF NEVADA, by and through the NEVADA STATE GAMING CONTROL BOARD and its agents, negligently, deliberately, intentionally, collusively and perhaps maliciously, simply do not enforce the said statute since considerable revenues are derived from minors' play, and the very fact that this event happened, and on the very face of the GAMING CONTROL BOARD's actions, is proof positive that the subject statute offers no guidance and leaves room for further arbitrary and capricious and over-reaching enforcement applications by Gaming Control Agencies, as well as engenders malicious and fraudulent conduct on the part of the licensees. It is therefore necessary to have these laws and policies and their application and enforcement procedures delved into by this Court prior to any further injustices brought by these so-called "administrative remedies".

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Compensatory damages against the Defendants, and each of them, in the amount of $1,061,812.00, plus consequential damages in an amount yet to be determined.

2. An award of exemplary damages against Defendant Caesars Palace in the amount of $20,000,000.00.

3. A declaratory judgment finding the subject statute as it is presently being implemented and enforced to be unconstitutional on its face or unconstitutional in its application.

4. An award of their costs, reasonable attorney fees, interest, and such other and further relief as the Court deems just and equitable in the premises.

DATED this 11th day of August, 1988.

JAMES P. SITTER, CHTD.

BY: /s/
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